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Tagore Law Lectures, 1893.

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ESTOPPEL BY REPRESENTATION AND RES JUDICATA IN BRITISH INDIA.

IN TWO PARTS.

I—MODERN OR EQUITABLE ESTOPPEL.

II—ESTOPPEL BY JUDGMENT.

BY

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PREFACE TO THE SECOND EDITION.

A SECOND Edition of my Tagore Law Lectures having been called for, I have taken the opportunity to carefully revise the former work. About one hundred and fifty cases have been added, and I trust the book will be found up to date. The title has been slightly altered so as to accentuate fully the distinction between the two branches of the subject—Estoppel by Representation and Res Judicata. I have attempted throughout to present the law as it is actually in force in British India, and to assist practitioners. The rapid sale of the first edition leads me to hope that the work has not altogether failed in its object.

In the present edition the width of the columns has been slightly increased, thereby lessening the number of pages.

A. C.

13*th September*, 1896.

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PREFACE TO THE FIRST EDITION.

THE following pages contain the substance of sixteen Tagore Law Lectures delivered in the months of November, December, and January last.

The literature of the subject consists of:—(1) Mr. Bigelow's Treatise on the Law of Estoppel and its Application in Practice. [5th Ed., Boston: Little, Brown & Co., 1890]; (2) The Law of Estoppel, Everest and Strode. [London: Stevens and Sons, 1884]; (3) An Essay on the Principles of Estoppel. [London: Maxwell and Son, 1888]; all of which have been consulted, and to which the author desires to express his obligations.

It will, however, be observed that a new departure has been made in the present arrangement and treatment of the Law of Estoppel. As to this a word of explanation is necessary.

The two branches of Estoppel rest upon different principles. Estoppel by Representation consists of an infinite number of applications of the doctrine of changed situations, and, in view of the recent important decision of the Judicial Committee in *Sarat Chunder Dey* v. *Gopal Chunder Laha*,[1] is capable of a more extended application. Estoppel by Judgment, on the other hand, which has hitherto been brought into greater prominence in the text-books, depends upon the principle of finality in litigation, and has its limits clearly defined.

[1] I. L. R., 20 Calc., 296; L. R., 19 I. A., 203 [1892].

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It is to be observed that the Law of Estoppel in this country in no way differs, as to its principles, from the present law relating to this subject in England. But, as regards Estoppel by Representation, the subject has developed irregularly in India, and the Indian cases often fail to illustrate important topics. The principal English decisions have, therefore, been set out, sometimes at considerable length, in view of the fact that the English Reports are not always accessible to the practitioner. Estoppel by Judgment, on the other hand, is more completely codified in this country, and the Indian Case-Law affords ample illustration.

No apology seems to be needed for confining, as far as possible, within the limits of the Introductory chapter, the historical and obsolete aspects of a subject which has its foundations in modern decision.

For the convenience of readers, the date of each case has been placed next after the reference, and also in the Table of Cases, and the Index has been made as full and complete as possible.

A C.

CALCUTTA, *July* 1893.

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Young *v.* Grote, 4 Bing., 253 [1827] 174, 175, 176, 202, 203
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Zamindar Srimatu Gaurevallaba *v.* Virappa Chetti, 2 Mad. H. C., 174 [1864] 13, 216, 217
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ESTOPPEL

BY REPRESENTATION AND RES JUDICATA.

INTRODUCTION.

Leading Principles.

Introductory—(*a*) Position of Estoppels in Jurisprudence—Remedial Rights—Estoppels as rules of Evidence—Admissions—Representations—Part-Performance—Estoppel by Judgment—Merger—(*b*) Historical Division—Growth of Equitable Estoppel—Unpopularity of Estoppels—Estoppel by Record in the Roman Law and at Common Law—Estoppel by Deed—Estoppel in Pais—(*c*) Practical Division—Representations—Estoppel by Conduct—Doctrine of Changed Situations—Benami Transactions—Landlord and Tenant—Bailor and Bailee—Licensee of Patent—Vendor and Purchaser—Principal and Agent—Negotiable Instruments—Estoppel in connection with Companies—Estoppel by Matter in Writing—Admissions—Admissions in the course of Judicial Proceedings—Estoppel by Judgment—Rule as recognised in India—Forum—Parties—Subject Matter—Cause of Action—Judgments in rem—Foreign Judgments—Treatment of the Subject.

Introductory.

The main object of this Introduction is to clear the ground for a detailed examination of the various branches of the law pervaded by the doctrines of Estoppel, so as to start with accurate notions as to the limits of the subject.[1] Bearing this in view, it is proposed in the first place to define the position of Estoppels in the field of Jurisprudence; secondly, very briefly to treat of the historical side of the question; and lastly, to lay down as clearly

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[1] "The word 'estop' is often used in the Indian cases very loosely to denote obligations which do not rest on Estoppel at all. Such uses of the word are not countenanced by the definition of Estoppel in section 115 of the Evidence Act." *Surendro Keshub Roy* v. *Doorga Soondery Dossee*, I. L. R., 19 Calc., 513 (532); L. R., 19 I. A., 108 [1892]. In *Sarat Chunder Dey* v. *Gopal Chunder Laha*, L. R., 19 I. A., 203; L. R., 20 Calc., 296 [1892], their Lordships of the Privy Council have laid down that section 115 does not enact anything different from the law of England on the subject of Estoppel by Representation.

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as possible the general scheme of these lectures, assigning each topic to its appropriate place.

Estoppels are either rules of Evidence or form part of the law of Civil Procedure.

Estoppels are sometimes regarded as fictitious statements treated as true, and modern Estoppel has been stated to have been established with the deliberate intention of making falsehood take the place of truth.[1] Estoppels are, however, of infinite variety[2] and cannot be manufactured arbitrarily.[3] The simplest way of apprehending their nature will be to regard them either as rules of Evidence,[4] or as forming a branch of the law of Civil Procedure.[5]

(*a*) *Juristic Division.*

Their position in Jurisprudence.

The function of Substantive law being to define rights and liabilities, Adjective law deals with the application of Substantive law to particular cases, providing a method of assisting the *person of inherence* or the person in whom the right resides, against the *person of incidence*, or the person against whom the right is available. Estoppels come under the head of Adjective law, Estoppel by REPRESENTATION being a branch of the law of Evidence which determines what facts are to be proved, and the manner in which they may be proved, while Estoppel by JUDGMENT falls within the class of rules framed for the conduct of legal proceedings for the purpose of bringing before the Courts the materials upon which the facts are to be proved.[6]

Remedial rights.

Rights may further be regarded as antecedent or remedial. The causes of remedial rights are infringements of antecedent rights. A remedial right depends for its enforcement upon the

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[1] L. Q. R., Vol. vi, 79. See the remarks of Jessel, M.R., in *General Finance, &c. Co.* v. *Liberator*, L. R., 10 Ch. D., 15 (20) [1878]. "The whole doctrine of estoppel of this kind, which is a fictitious statement treated as true, might have been founded in reason, but I am not sure that it was. There is another kind of estoppel—Estoppel by Representation—which is founded upon reason, and it is founded upon decision also." See also *per* Bramwell, L. J., in *Simm* v. *Anglo-American Telegraph Co., &c.*, L. R., 5 Q. B. D., 202 [1879]. "An estoppel may be said to exist where a person is compelled to admit that to be true which is not true and to act upon a theory which is contrary to the truth."

[2] *Per* Garth, C. J., in *Ganges Manufacturing Co.* v. *Sourujmull*, I. L. R., 5 Calc., 669 [1880].

[3] *Per* Chitty, J., in *Colonial Bank* v. *Hepworth*, L. R., 36 Ch. D., 36 [1887].

[4] Estoppel is treated in English works on Evidence under the head of conclusive as opposed to disputable presumptions. See Pitt Taylor, 8th ed., Chap. V, p. 114.

[5] See *Sita Ram* v. *Amir Begum*, I. L. R., 8 All., 325 (331) [1886]; *Balkishan* v. *Kishan Lal*, I. L. R., 11 All., 148 (153) [1888].

[6] Stephen, Introduction to the Evidence Act, 134. Holland's Jurisprudence, Chapter XV.

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power of the State; and Adjective law prescribes the mode in which the assistance of the State is to be invoked, that is, the steps which have to be taken in order to set in motion the machinery of the law-courts. Thus Adjective law comprises rules for the following purposes :—[1]

(*a*) Selection of jurisdiction and an appropriate tribunal.
(*b*) Summoning the defendant and the witnesses.
(*c*) Informing the Court by means of pleadings of the nature of the plaintiff's claim and of the defence set up.
(*d*) Settlement of issues narrowing the scope of the proceedings to certain definite points upon which the parties are at issue.
(*e*) Framing rules of EVIDENCE as to the way in which the facts are to be proved upon which each party endeavours at the hearing to maintain the truth of his view of the case.
(*f*) The JUDGMENT by which the Court decides the matters in litigation.
(*g*) The procedure in appeal.
(*h*) Execution, or the means by which the successful party may obtain the assistance of the State to carry the judgment in his favour into effect.

Estoppels as rules of Evidence.

The position of Estoppels in the law of Evidence is that of personal disqualifications filling up a gap in the evidence[2] and operating so as to prevent either party from proving certain facts in judicial proceedings. The object of judicial proceedings is to ascertain rights and liabilities which are dependent on and arise out of *facts*, which again are either facts in issue or relevant to the issue. Before an alleged fact can be treated as existing so as to allow the Court to draw inferences from it, the fact must be properly proved, and the instrument by which a Court is convinced of the existence of a fact is *evidence*.[3] In certain cases a party to a proceeding will be precluded or estopped from denying the truth of a matter which he has intentionally caused or permitted another to believe to be true, and to act upon that belief.[4] Estoppel is

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[1] Holland's Jurisprudence, Chapter XV.

[2] See *Low* v. *Bouverie*, L. R., '91, 3 Ch., at p. 105, *per* Bowen, L. J.

[3] Stephen, Introduction to the Evidence Act, Chapter I.

[4] Evidence Act (I of 1872), s. 115.—"Estoppel is only a rule of Evidence; you cannot found an action upon Estoppel. Estoppel is only important as being one step in the progress towards relief on the

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effective where an action must succeed or fail if the defendant or plaintiff is prevented from disputing a particular fact alleged.

Admissions.

In this connection it is necessary to explain what is an Admission. ADMISSIONS are statements suggesting an inference as to facts made under certain circumstances, and are not conclusive proof of the matters admitted unless based upon representations of such a nature as to give rise to an estoppel, in which case the truth of the admission is not allowed to be denied.[1] Estoppels, regarded as rules of Evidence, are founded upon Representations, and are nearly akin to Admissions, being similar in effect but more powerful in degree.

Representations.

REPRESENTATIONS may operate as being a part of the transactions constituting a contract, in which case the estoppel is said to be merged in the contract, and may give rise to the rescission of the contract obtained by its means or to compensation.[2] A Representation may also operate, apart from any contract, as an estoppel preventing the person making it from denying its truth as against any person whose conduct has been influenced by it. Here the statement is binding, apart from any promise or agreement, as part of the general law of Estoppel. Representations may also become actionable as wrongs or may amount to a criminal offence.[3] It is, however, necessary to point out, and the fact should always be borne in mind when dealing with a question of Estoppel by Representation, that a statement in order to found an estoppel should be clear and unambiguous.[4]

Part-performance.

It should be remembered, too, that Representations only operate as estoppels when there has been a Part-performance of some kind,

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hypothesis that the defendant is estopped from denying the truth of something which he has said." *Per* Bowen, L. J., in *Low* v. *Bouverie*, '91, 3 Ch., at p. 105.

[1] Evidence Act (I of 1872), ss. 17—31.

[2] See Pollock on Contract. Ed. 5, pp. 505—507.

[3] *Per* Stephen, J., in *Maddison* v. *Alderson*, L. R., 5 Ex. D., 293 [1880].

[4] "This is an ancient rule as to estoppel by statements in a deed, as appears from Rolle's Abr. 'Estoppel : ((P) pl. 1 and 7),' and was acted upon by Lord Cairns in *Heath* v. *Crealock* [L. R., 10 Ch., 22 (1874)]. In *General Finance, &c., Co.* v. *Liberator* [L. R., 10 Ch. D., 15 (1878)], Sir J. Jessel followed the last case and intimated that, in his opinion, the doctrine ought not to be extended, there being no reason for preferring one innocent purchaser to another. That certainty of statement is also required to maintain an estoppel upon a statement not by deed, appears from *Freeman* v. *Cooke* [2 Ex., 654 (1848)], where relief was refused upon the ground that no reasonable man would have acted on the faith of the statements made if they were taken together." *Per* Kay, L. J., in *Low* v. *Bouverie*, L. R., '91, 3 Ch., at p. 113, and see *per* Bowen, L. J., at p. 106.

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that is to say, when the other party has been induced to alter his position by reason of the Representation.

Estoppel by Judgment. Merger.

The position of Estoppel by JUDGMENT has next to be considered. Upon judgment being given, the remedial right belonging to the person of inherence extinguishes itself and becomes merged in a new right, and the judgment of a superior Court has, by virtue of its conclusiveness, come to be regarded as creative of rights instead of merely declaratory of them.[1] A judgment may be regarded as conclusive, either upon the principle that it is such cogent evidence that no averment to the contrary can prevail against it, or upon the more reasonable ground that the object of the suit being obtained as far as possible at that stage, it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result. The cause of action is changed into matter of record and the inferior remedy is merged in the higher.[2] The rule of Estoppel by Judgment may be simply stated to be that the facts actually decided by an issue in one suit and in a competent Court cannot be again litigated between the same parties, and are conclusive between them for the purpose of terminating litigation.[3]

Classification.

Estoppels in a scheme of Jurisprudence may therefore be presented as follows :—

I. Positive law means and includes—
   1. Substantive law which defines rights and liabilities.
   II. Adjective law which enforces remedial rights through the instrumentality of the Courts by providing for (*inter alia*)—
      (*a*) rules of Evidence limiting the field of enquiry,
      (*b*) the conclusiveness of certain Judgments.

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[1] L. Q. R., Vol. vi, 82, where it is pointed out that similarly a bond instead of proving a debt has come to be regarded as creating a new right.

[2] *King* v. *Hoare*, 13 M. & W., 494 [1844]. *Per* Parke, B. "If there be a breach of contract or wrong done or any other cause of action by one against another and judgment be recovered in a Court of Record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty and the object of the suit attained so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim '*Transit in rem judicatam*'—the cause of action is changed into matter of record which is of a higher nature, and the inferior remedy is merged in the higher." See *Greathead* v. *Bromley*, 17 East, 456 [1798].

[3] *Boileau* v. *Rutlin*, 2 Ex., 665 [1848]. "The facts actually litigated by an issue in

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II. One branch of the law of Estoppel belongs to the subject of EVIDENCE, and consists of rules disqualifying certain persons from denying the truth of representations made by them upon the faith of which others have acted.

III. The other branch of the law of Estoppel relates to the conclusiveness of certain JUDGMENTS, and as a part of the law of procedure belongs to the division of Adjective law. The rule of procedure, however, which declares that two actions cannot be brought for the same cause, passes by merger into a rule of Substantive law, the right upon which the judgment is founded being merged and destroyed in the right created by the judgment itself.

(*b*) *Historical Division.*

Growth of equitable Estoppel.

The Common Law doctrine of Estoppel is stated by Vice-Chancellor Bacon to have been a device to which the Common Law Courts resorted to *strengthen and lengthen their arm* and by tactics of special pleading to obtain for themselves the power which the Court of Chancery could exercise without foreign assistance.[1] In the result technicalities of a confusing and oppressive character were created, and men were often entrapped by formal statements and unguarded admissions. By degrees, however, the sound and reasonable principle was established that men should be enabled and encouraged to put faith in the conduct and statements of their fellows.[2] The principle upon which the modern doctrine of Estoppel by Representation rests is that of common honesty and good faith, which in reality tends to maintain right and justice and the

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any suit cannot be again litigated between the same parties and are evidence between them, and that conclusive, upon a different principle and for the purpose of terminating litigation." *Per* Parke, B., p. 681. See Code of Civil Procedure (Act XIV of 1882), ss. 13, 14; Evidence Act (I of 1872), ss. 40—42.

[1] *Keate* v. *Phillips*, L. R., 18 Ch. D., 560 (577) [1881]. This remark of Bacon, V. C., appears to throw a flood of light upon a very difficult subject. The Vice-Chancellor observes further that the doctrine of Estoppel is purely legal, that is, that Estoppel in its technical sense is a device of the Common Law corresponding to the doctrine of Representation in Equity. In a modern sense Estoppel may probably be regarded as a wholly equitable doctrine. See *Jorden* v. *Money*, 5 H. L. Ca., 213 [1854]; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, L. R., 6 E. and I. A., 35 (360) [1873]; *Low* v. *Bouverie* L. R., '91, 3 Ch., 82.

[2] L. Q. R., Vol. i, 127. 'In the old law-books,' says Mr. Smith, 'truth appears to have been frequently shut out by the intervention of an Estoppel when reason and good policy required that it should be admitted.' Smith's Leading Cases, notes to *Duchess of Kingston's* case, 9th ed., Vol. ii, 829.

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enforcement of contracts which men enter into with each other—one of the great objects of all law.[1] As will presently be shewn, the doctrine of Estoppel by Representation founded upon contract was practically unknown in the time of Lord Coke. Now, however, a doctrine which was formerly condemned as *odious*, and considered to make rather against than on the side of truth, has been expounded by Courts of Equity in a wise and liberal spirit to the promotion of confidence in business transactions and the discouragement of fraud.

Unpopularity of Estoppels.

Some of the *dicta* of the English Judges arranged in chronological order will serve to illustrate the gradual recognition of the utility of Estoppel *in Pais*, or by Representation.[2]

Recognition of their utility.

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[1] *Per* Baron Martin in *Cuthbertson* v. *Irving*, 4 H. & N., 758 [1859], or as Eyre, C. J., puts it.—"This all proceeds upon an *argumentum ad hominem*, it is saying you have the title but you shall not be heard in a Court of Justice to enforce it against faith and good conscience." *Collins* v. *Martin*, 1 Bos & Pul., 651 [1797].

[2] "Estoppels are so-called because a man's act or acceptance stoppeth or closeth his mouth to allege or plead the truth." Co. Litt. 352*a*. See also 352*b*.—"Estoppels are odious and not to be construed or raised by implication." *Palmer* v. *Ekins*, 2 Ld. Raym.. 1553 [1728]. "The law of Estoppel is not so unjust or absurd as it has been too much the custom to represent," *per* Taunton, J., in *Bowman* v. *Taylor*, 2 Ad. & E., 291 [1834]. In *Howard* v. *Hudson*, 2 El. & B., 1 [1853], Lord Campbell speaking of "what is called an Estoppel" says: "It is not quite properly so-called but it operates as a bar to receiving evidence. Like the ancient Estoppel this conclusion shuts out the truth and is odious and must be strictly made out." Wightman, J., added, "I prefer not to use the word 'estopped.'" But Crompton, J., observed, "I do not think an Estoppel of this kind is always odious; in many cases I think it extremely equitable to act upon the doctrine. The rule (as explained in *Pickard* v. *Sears* and *Freeman* v. *Cooke*) takes in all the important commercial cases." In *Lewis* v. *Clifton*, 14 C. B. (N. S.), 254 [1854] Jervis, C. J., observes, "Nor is there any Estoppel *in pais* or by standing by,—a doctrine which seems to me to have been carried to a dreadful extent."—"The doctrine of Estoppel, though now to a great extent obsolete, was well known in ancient times," *per* Martin, B., in *Swan* v. *North British Australasian Co.*, 7 H. & N., 641 [1862]. "The doctrine established by the cases of *Pickard* v. *Sears* and *Freeman* v. *Cooke* is a most useful one, and I should be sorry to see it narrowed or frittered away." *Per* Mellor, J., in *Swan* v. *North British Australasian Co.*, 2 H. & C., 177 [1863]. "In various forms the law has always held men to their own acts and representations where the interests of others have been affected by them." *Per* Wilde, B., in *Swan* v. *North British Australasian Co.*, 7 H. & N., 632 [1863]. Mellor, J., in *Board* v. *Board*, L. R., 9 Q. B., 48 (54) [1372], speaks of "the wholesome doctrine of estoppel."—"Sometimes there is a degree of odium thrown upon the doctrine of Estoppel, because the same word is used occasionally in a very technical sense, and the doctrine of Estoppel *in pais* has even been thought to deserve some of the odium of the more technical classes of homologation. But the moment the doctrine is looked at in its true light it will be found to be a most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered." *Per* Lord Blackburn, in *Burkinshaw* v. *Nicholls*, L. R., 3 Ap. Cas., at p. 1026 [1878]. "Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be

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Estoppel at Common Law.

At Common Law there were three kinds of Estoppel—(*a*) by Record, (*b*) by Deed, (*c*) *in Pais*.

(*a*) Estoppel by Record.

Estoppel by Record is derived from the principle recognised in the Roman Law, *res judicata pro veritate accipitur*, a matter once decided is to be taken for truth, the principle being that when there has once been a judicial determination of a cause agitated between real parties upon which a real interest has been settled[1] the decision operates as a bar to a re-litigation of the same matter so that a multiplicity of suits may be avoided.

Estoppel by Record at Common Law.

Actions in the time of Gaius (A.D. 150) were either statutable (*judicia legitima*) instituted at Rome or within the first milestone, or supported by magisterial power (*imperio continentia*) under the authority of the prætor. The institution of an action belonging to the former class operated as an extinctive bar (*ipso jure*) to a subsequent action on the same question, the original obligation being extinguished by novation. In the case of actions deriving their force from the prætorship, the original obligation continued so that a second action might be brought, but plaintiff could be repelled by the counteracting plea of previous judgment (*exceptio rei judicatae*) or pending litigation (*exceptio rei in judicium deductae*).[2]

The principle upon which the rule proceeded was to prevent interminable litigation and the embarrassment of contrary decisions:

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applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do." *Per* Bramwell, L. J., in *Baxendale* v. *Bennett*, L. R., 3 Q. B. D., 529 [1878]. "I do not wish to speak against the principle of estoppels, for I do not know how the business of life could go on, unless the law recognised their existence; but an estoppel may be said to exist, where a person is compelled to admit that to be true which is not true and to act upon a theory which is contrary to the truth. I do not undertake to give an exhaustive definition, but that formula nearly approaches a current definition of Estoppel." *Per* Bramwell, L. J., in *Simm* v. *Anglo-American Telegraph Co.*, L. R., 5 Q. B. D., 188 (202). [1879]. "The doctrine of Estoppel was recognised in the Courts of Common Law just as much as it was in the Courts of Equity, and it seems to me that an estoppel gives no title to that which is the subject-matter of estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying, and the estoppel has no effect at all upon the reality of the circumstances . . . I am speaking now of the estoppels which arise upon transactions in business or in daily life." *Per* Brett, L. J., in *Simm* v. *Anglo-American Telegraph Co.*, at p 206.

[1] Per *argumentum* in *Duchess of Kingston's* case, approved in *Bandon, Earl of* v. *Becher*, 3 Cl. & F., 510 [1835]. See *Brunsden* v. *Humphrey*, L. R., 14 Q. B. D., 141 (148) [1884].

[2] Gaius Inst., Book III, Tit. 181, Book IV, Tit. 103—107.

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le aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem maxime si diversae pronuncientur,[1] and hence the maxim that judicial decisions should be assumed to be true.[2] The plea of previous judgment was recognised as a bar whenever the same question of right was renewed between the same parties by whatever form of action.[3] "If the question be asked," says a writer in the Digest, "does this plea work injustice, it is necessary to see whether the subject-matter is the same, whether the relief claimed is the same, and whether the parties occupy the same position as in the former suit. Unless all these are identical the matter is of a different nature."[4]

In the time of Justinian *res judicata* had ceased to have an extinctive operation (*ipso jure*) and only generated an *exceptio* or counteractive plea, novation no longer operating. On the other hand, the rules governing the *exceptio rei judicatae* became of a more liberal and beneficial character, having in view the object of preventing multiplicity of suits. "The operation of the plea," says Mr. Poste,[5] "was not less powerful or less extensive, but made more completely conformable to equity."

Res judicata in the Roman Law.

Estoppel by Judgment or Record is a part of the Common Law of England. "The rolls being the records or memorials of the Judges of the Courts of Record import in them such incontrollable credit and verity as they admit no averment, plea or proof to the contrary....., and the reason hereof is apparent, for otherwise there should never be any end of controversies which should be inconvenient."[6] "The rule of the ancient Common Law," as remarked in a recent case, "is that where one is barred in any action, real or personal, by judgment, demurrer, confession, or verdict, he is barred as to that or the like action of the like nature for the same thing for ever."[7] "It has been well said," says Lord Coke in a note to Ferrer's case,[8] "*interest reipublicae ut sit finis*

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[1] Dig. 44, 2, 6.

[2] *Res judicata pro veritate accipitur.*

[3] *Exceptio rei judicatae obstat quotiens inter easdem personas eadem quaestio revocatur vel alio genere judicii.* Dig. 44, 2, 7, 4.

[4] *Cum quaeritur haec exceptio noceat necne, inspiciendum est an idem corpus sit, quantitas eadem, idem jus: et an eadem causa petendi et eadem conditio personarum, quae nisi omnia concurrunt, alia res est.* Dig. 44, 2, 12—14.

[5] Poste's Gaius, 2nd ed., p. 579.

[6] Coke Inst., 260.

[7] *Per* Bowen, L. J., in *Brunsden* v. *Humphrey*, L. R., 14 Q. B. D., 149 [1884].

[8] Coke, 9*a*.

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litium, otherwise great oppression might be done under colour and pretence of law." The principle is frequently stated in the form of another legal proverb *nemo debet bis vexari pro eadem causa*.[1]

The ground upon which estoppels of this kind appear to have been enforced at first is that of the sanctity of the Record. During the time that a suit was pending the record was presumed to reside in the breast of the Judges and in their remembrance, and the roll was alterable during that time as the Judges might direct, but when that term had elapsed the roll itself became the record.[2] The wider principle of the Roman Law was afterwards gradually recognised, and in the time of Coke the two principles are seen existing side by side. At the same time other principles came to be applied, limiting the conclusive effect of the record. Thus the record did not operate conclusively where the truth appeared on the same record,[3] or where the thing averred was consistent with the record,[3] or where the record was not certain,[3] or was founded upon an assumption,[3] or was not material, or where there were competing estoppels.[4] These and other rules were applied not only to Estoppel by Record but to other kinds of estoppel. As regards Estoppel by Record, however, the leading doctrines became settled at an early date, and their extension to different classes of actions took place gradually, the difficulty in applying the main principle in each individual instance being to ascertain how far the cause which was being litigated afresh was the same cause in substance with that which had been the subject of the previous suit.[5]

In connection with this subject it is necessary to keep distinct and separate three things : (*a*) The Record strictly so-called which is the testimony of the Court itself and is conclusive as regards what has taken place at the trial and exclusive of every other kind of evidence on the subject,[6] except in certain cases a properly certified copy. (*b*) An admission made in a Court of Record[7] which amounts to an acknowledgment in the presence of the Court, the consequence of which is that the party making the admission is

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[1] *Brunsden* v. *Humphrey*, L. R., 14 Q. B. D., 147.

[2] Coke Inst., 260.

[3] Coke Inst., 352*b*.

[4] Estoppel against estoppel setteth the matter at large, Coke Inst., 352*b*.

[5] *Per* Bowen, L. J., in *Brunsden* v. *Humphrey*, L. R., 14 Q. B. D., 147 1884].

[6] See Coke Rep., 71*a*. Plowd., 491*a*.

[7] Glanv. viii, 5.

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for certain purposes precluded from denying it. (*c*) Judgments of Courts of Record which are conclusive against the parties themselves and sometimes operate against the world at large.[1]

Judgments may further be considered as being Domestic or Foreign, and *in rem* or *in personam*. The latter division will be considered first.

Real and personal actions in the Roman Law.

According to the Roman idea when an action rested upon obligation it was personal, when on a right of proprietorship it was real. Some claims were advanced against all men, others primarily against particular men.[2] Real actions were those which asserted *jura in rem* or rights to certain forbearances corresponding with a duty imposed upon all the world, while personal actions were brought to enforce rights against determinate persons.[3] The notion of persons as well as things was involved in both. *Jura in rem* were founded upon property, status, or servitude,[4] *jura in personam* being obligations arising out of contract or delict where a person was the subject of the right.[5]

It appears, however, that adjudications *in rem* were not considered at first as binding upon all the world, this idea being not formally adopted in the Institutes or by the leading jurists,[6] the principle being first clearly recognised in the Civil Law.[7]

Real actions in the English Law were actions claiming property in an immoveable thing, while a claim of property in a moveable was made by a personal action. A third class of actions where the status of a person or of a thing was determined came to be treated as actions *in rem*, namely, the judgments of Probate, Divorce, Admiralty, and Insolvency Courts.

Judgments *in rem* and *in personam*.

For the purposes of the subject before us, judgments *in rem* may be described as those which are conclusive against all the world, judgments *in personam* being those which are binding only upon parties and those claiming through them.

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[1] See L. Q. R., Vol. vi, 82–85.

[2] *Per* Sir Barnes Peacock in *Kanhya Lall* v. *Radha Churn*, 7 W. R., 338 [1867].

[3] Poste's Gaius, 2nd ed., 486.

[4] *In rem actio est cum aut corporalem rem intendimus nostram esse, aut jus aliquod nobis competere, velut utendi, aut utendi fruendi, eundi, agendi, aquamve ducendi, vel altius tollendi, vel prospiciendi.* Gaius IV, 3.

[5] *In personam actio est qua agimus quotiens cum aliquo qui nobis vel ex contractu vel delicto obligatus est contendimus, id est, cum intendimus dare facere praestare oportere.* Gaius IV, 2.

[6] Bigelow on Estoppel, 2nd ed., p. 9.

[7] Sandar's Inst., p. 573.

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Judgments Domestic and Foreign.

Judgments may also be considered as Domestic or Foreign. A Foreign Court is a Court situated beyond the limits of British India and not having authority in British India, nor established by the Governor-General in Council, and a Foreign Judgment is the judgment of such a Court.[1] A Domestic Judgment, following the above definition, is a judgment other than a Foreign Judgment.

Foregin Judgments.

In discussing the subject of *Res Judicata*, Foreign Judgments *in rem* as well as *in personam* will be considered apart from Domestic Judgments. The principle upon which Foreign Judgments are enforced by suit is different to what is loosely called comity,[2] and proceeds rather upon the ground that the judgment of a Foreign Court of competent jurisdiction imposes on the defendant a duty or obligation which the Courts of this country are bound to enforce.[3] Foreign Judgments *in rem* came to be enforced first from motives of policy rather than comity, while foreign Judgments *in personam* were at first regarded only as *primâ facie* evidence of a debt and liable to be impeached.[4]

(*b*) Estoppel by Deed.

The rule of Estoppel by Deed arose from the solemnity of the transaction which was regarded as an infallible method of establishing the fact that certain legal duties had been created.[5] The parties having agreed to bind themselves by an act of peculiar importance and solemnity, they were held to be precluded from denying its effect not merely as to the interests conveyed but also as regards matters recited.[6] The rule rested practically upon the idea that written evidence was of a higher character than verbal evidence, and when this idea came to be discredited in time, attempts were made to discover a new foundation for the rule.[7] The tendency has gradually gained in force to regard estoppel as founded on *contract*, the meaning of the term being that the parties have agreed, for the purposes of a particular transaction, to treat certain facts as true.[8]

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[1] Act XIV of 1882, s. 2.

[2] *Schibsby* v. *Westenholz*, L. R., 6 Q. B., 155 (159) [1870].

[3] *Russel* v. *Smyth*, 9 M. & W., 810 [1842]; *Williams* v. *Jones*, 13 M. & W., 628 (633) [1845].

[4] *Walker* v. *Witter*, 1 Doug. 1 [1778].

[5] See Pollock on Contract, Ed. 5, 131.

[6] L. Q. R., Vol. vi, p. 75, an article "On the Superiority of Written Evidence" which deserves careful study.

[7] L. Q. R, Vol. vi, *ib.*

[8] *Horton* v. *Westminster Improvement Commissioners*, 7 Ex., 791 [1852].

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Estoppel by Deed has been expressly discountenanced by the Courts of British India where the art of conveyancing has been and is of a very simple character.[1] Estoppel does, however, frequently arise from written agreements or from assent thereto, which is in reality a form of estoppel by conduct and is based upon contract or agreement. In some cases, however, it need scarcely be pointed out that nothing more than an admission arises. The subject will be considered hereafter.[2]

(c) Estoppel *in Pais.*

Estoppel *in pais* as known to the Common Law was of an entirely different character to the Estoppel *in pais* of the present day. In the time of Lord Coke, there were five kinds[3] of Estoppel *in pais* arising out of: (1) liverie; (2) entry; (3) acceptance; (4) partition; and (5) acceptance of an estate.[4] These acts *in pais*, as pointed out oy Mr. Bigelow, possessed the same conclusive characteristics as the Estoppel by Record or by Deed, the only rule of Estoppel known at this time being that by Deed. The feoffment itself at one time was an act *in pais*, and possessed a higher effect as an estoppel than the deed which was employed to perpetuate its existence or to transfer a reversion in the same land when held by a tenant of the feoffor. Feoffment was, however, abolished by the Statute of Frauds. Estoppel in cases of partition appears to have arisen out of the Common Law duty of co-tenants to aid one another in protecting the common estate, it being incompatible with their duty to each other for either of them to set up an adverse title. This form of Estoppel exists in British India at the present day and will be considered hereafter. The only other one of these early forms of estoppel which has survived is that by acceptance of rent, which originally applied to the case of a feoffment without writing, that is to say, in the case of a tenant holding

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[1] *Gokaldas Gopaldas* v. *Puramal Premsukhdas*, I. L. R., 10 Calc., 1035 [1884]; *Zemindar Srimatu Gourevallaba* v. *Virappa Chetti*, 2 Mad. H. C., 174 [1864], and see *Param Singh* v. *Lalji Mal*, I. L. R., 1 All., 403 [1877]; *Ramgopal Law* v. *Blacquière*, 1 B. L. R. (O. C.), 37 [1869]; *Donzelle* v. *Kedarnath Chuckerbutty*, 7 B. L. R., 720 [1871]; *Kedarnath Chuckerbutty* v. *Donzelle*, 20 W. R., 352 [1873].

[2] Part I, Chapter X.

[3] These were all "acts which anciently really were, and in contemplation of law have always continued to be, acts of *notoriety* not less formal and binding than the execution of a deed; whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." *Per* Parke, B., in *Lyon* v. *Reed*, 13 M. & W., p. 309 [1844].

[4] Coke Inst., 352*a*.

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over after the lease by deed had expired. The modern estoppel of the tenant who may not, while in possession of the premises, dispute his landlord's title, is founded upon contract, and may be regarded as the origin and root of equitable estoppel. The growth and application of the doctrine of Representation will be explained hereafter.[1]

Historical Division.

The development of Estoppels in their historical order may be shown as follows :—

(1) At Common Law there were three kinds—

(*a*) by Record.

i. The record of any proceeding in one of the King's Courts was conclusive evidence that such a proceeding had taken place.

ii. Admissions made in Courts of Record sometimes operated as estoppels.

iii. Matters adjudicated upon by a competent Court between parties were held conclusive as between the same parties in any subsequent proceeding. This is the rule of *res judicata* as laid down in ss. 13 and 14 of the Code of Civil Procedure.

(*b*) by Deed arising out of the solemnity of the transaction.

(*c*) *in Pais* springing from (i) liverie ; (ii) entry ; (iii) acceptance of rent ; (iv) partition ; (v) acceptance of an estate by feoffment. Of these (i), (ii), and (iii) are obsolete ; (iv) still exists, and out of (v) has sprung the estoppel of a tenant to deny his landlord's title which is really founded on contract.

(2) In Equity the doctrines of Representation and Part-performance have been extended so as to create the modern law of Estoppel. Representations may operate in the following ways[2] :—

(*a*) A false statement may create a contractual obligation as being part of a contract.

(*b*) Though unconnected with any contract it may under the general law of Estoppel create an obligation analogous to contract.

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[1] Part I, Chapter I.

[2] Pollock on Torts, 2nd ed., 248, and see *Alderson* v. *Maddison*, L. R., 5 Ex. D., 293 [1880].

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(*c*) If incapable of being regarded in one or more of these ways it may afford a cause of action in tort for deceit.

(*d*) It may in either of the above cases further give rise to an offence punishable by the criminal law.

(3) Admissions may or may not operate as estoppels.

The subject will then be divided as follows :—

Practical Division.

I. Modern or Equitable Estoppel which is founded upon Representations and arises out of contract or relations analogous to contract. The subject will be considered under the following branches :—

(*a*) Estoppel by conduct.

(*b*) Estoppels arising out of documents or written agreements.

(*c*) Admissions operating as estoppels including admissions made in the course of judicial proceedings.

II. Estoppel by Judgment including—

(*a*) Domestic Judgments *in personam*.

(*b*) Judgments *in rem*.

(*c*) Foreign Judgments *in personam*.

(*c*) *Practical Division.*

I.—Equitable Estoppel.—*Representations.*

Estoppel by Representation.

It has been seen that an estoppel may arise out of a false statement which is a term in a contract, and if unconnected with any contract, may nevertheless create an obligation analogous to contract.[1]

A Contract arises when an agreement becomes enforceable at law.[2] While the parties to an agreement are still in the stage of negotiation, and before an agreement is come to, they may be regarded as proceeding upon a common platform made up of representations on both sides. When they once agree upon the same thing in the same sense, a binding contract results.[3]

Upon general principles a man may not avoid or withdraw from a contract once deliberately entered into, but it is still open to him to show that his consent was obtained by representations amounting to a fraud. He may then insist that the contract should receive that interpretation which he was led to believe would be placed upon it at the time the contract was made.[4] The causes

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[1] *Per* Stephen, J., in *Alderson* v. *Maddison*, L. R., 5 Ex. D., 293 [1880].

[2] Act IX of 1872, § 2 (*h*).

[3] *Ib.*, § 13.

[4] *Ib.*, § 19.

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which will set equity in motion in his favour are fraud and misrepresentation: but these are not sufficient unless the party deceived has been led to alter his position.[1] He may then elect to declare the contract void, or he may insist upon its performance according to the fair construction of the representations upon which he was induced to act. But negligence on his part, where he might with due care have discovered the real truth of the matter, will disentitle him to relief in equity.[2]

Estoppel by Conduct.

The rule of Estoppel by Conduct carries these principles a step further. Upon the general grounds of faith and good conscience a person who, by his declaration, act or omission, has caused another to believe in a certain state of things and to act upon his belief, is precluded from denying the truth of that which by his conduct he has caused the other to believe to be true. It must appear that there was on the one side a misrepresentation as to, or a concealment of, material facts made wilfully or even unintentionally to a person ignorant of the truth of the matter. There must further be the probability that the latter should act upon the representation, and he must in fact so act upon it before an estoppel can arise. The misrepresentation need not be made in express terms, and is frequently scarcely to be described as a misrepresentation at all, but may be implied from the general conduct of the party making it, and it will be sufficient to shew that, under the circumstances, any reasonable man would be deceived.[3] What is

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[1] "Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he has said or done or omitted to say or do."—*Ex parte Adamson. In re Collie*, L. R., 8 Ch. D., 807 (817) [1878].

[2] "But the moment the doctrine is looked at, will be found to be a most equitable one, and one in fact without which the law of the country could not be satisfactorily administered. When a person makes to another the representation, 'I take upon myself to say that such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me that it is of the very essence of justice that, between those two parties, their rights should be regulated by that conventional state of facts which the two parties agree to make the basis of their action."—*Per* Lord Blackburn in *Burkinshaw* v. *Nicholls*, L. R., 3 Ap. Ca., 1004 (1026) [1878]. See *In re British Farmers' Pure Linseed Cake Co.*, L. R., 7 Ch. D., 533 (539) [1878].

[3] "It is a very old head of equity that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good if he knows it to be false."—*Per* Lord Eldon in *Evans* v. *Bicknell*, 6 Ves., 183 [1801]. See *Smith* v. *Kay*, 7 H. L. Ca., 750 [1859].

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chiefly to be looked to is not the motive with which the representation is made, nor the state of knowledge of the party making it, but the *effect* of the representation and the *position* of the person who was induced to act.[1] The essence of the matter is that the latter has been misled.

A rule of Evidence.

But it must be recollected that an estoppel of this kind cannot form the basis of an action, and is only a rule of Evidence, and this fact distinguishes the case of estoppel from those cases where the effect of a negligent or innocent misrepresentation has been so much discussed.[2] And the old rule that estoppels to be effective must be clearly made out applies with peculiar force in this country. It has been often said that the language or conduct upon which an estoppel is based must be unambiguous and unequivocal. This does not mean that either the language or the conduct must be such that it cannot possibly be open to different constructions, but only that it must be such as will be *reasonably* understood in a particular sense by the person to whom it is addressed.[3]

Esotppel by acquiescence founded upon conduct.

A very common case in this country is that of the owner or mortgagee of property standing by and allowing an intending purchaser to deal with it under the belief that it belongs to some one else, and to advance money to third parties upon the security of the property, or to buy it of them for good consideration.[4] The doctrine of acquiescence to which this class of cases is referable is founded upon conduct.

Benami transactions.

Where a person takes a conveyance of estate in name of another, and while constituting such person the legal owner also allows him to appear to all the world as the sole equitable owner, he cannot turn round upon one who has honestly dealt with such person on the faith of his apparent ownership, and set up the secret trust in his own favour.[5]

In connection with this subject the effect of arrangements made in fraud of creditors, as between the colluding parties, requires

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"The principle applies to every case where confidence is acquired and abused, where confidence is reposed and betrayed."—*Per* Lord Kingsdown, at p. 779.

[1] *Sarat Chunder Dey* v. *Gopal Chunder Laha*, L. R., 19 I. A., 203 [1892]. The subject is very fully discussed in the chapter on Representations, Part I, Chapter I.

[2] See *Derry* v. *Peek*, L. R., 14 Ap. Ca., 337 [1889].

[3] *Per* Bowen, L. J., in *Low* v. *Bouverie*, L. R., '91, 3 Ch., 106.

[4] Part I, Chapters I, II.

[5] Part I, Chapter II.

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examination. The subject will be further considered in connection with Matter in Writing.[1]

The doctrine of Acquiescence also applies to cases where a binding family arrangement has been entered into for the purpose of effecting a partition or distribution of family property, or to recognise its disposition or management; and of a similar nature is the case where an adoption though invalid, has been recognised by long and active acquiescence, so that it would be inequitable to insist upon its invalidity.[2]

Trust.

In the cases above enumerated the relation between the parties appears to be one of trust rather than of contract. By far the most numerous cases, however, arise out of contractual relations or relations analogous to contract, and it will be conducive to a clearer apprehension of the subject if the cases are arranged with reference to the transactions out of which they arise.

Estoppels classified according to the transactions out of which they arise.

The estoppels between Landlord and Tenant arise out of the contract between the parties. Where the relation of Landlord and Tenant has been created, the lessee is not allowed to question his lessor's title during the continuance of the tenancy, though he may confess and avoid it by shewing that the tenancy has expired. The same rule applies to persons claiming through the tenant or coming into possession by license of the person in possession. The relationship of Landlord and Tenant may be inferred from the payment of rent, attornment, or other circumstances, but it is open to the tenant to shew mistake. The question frequently arises, from whom has the tenant derived possession, and the tenant may under certain circumstances shew that the title is not in the landlord but in some other person. The estoppel against the landlord is a kind of estoppel by title, and arises where the lessor has stated that he is entitled to a specific estate, and the lessee acts upon the assumption that such an estate was to pass, but only a smaller estate did in fact pass. The grant, in such a case, operates upon any after-acquired interest of the grantor. Another estoppel may arise where a landlord allows tenants to erect buildings on the land and there has been something nearly amounting to an agreement or license to that effect.[3]

Landlord and Tenant.

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[1] Part I, Chapter X.
[2] Part I, Chapter II.
[3] Part I, Chapter III.

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The case of a Licensee of a Patent is very analogous to that of a tenant. He has contracted with the licensor for the use of the invention without regard to the fact whether it can be sustained upon litigation. He may, however, show that the patent has expired. It is conceived that similar principles may apply in the case of trade-mark and copyright. Reported cases upon this subject are infrequent in India, but numerous instances may occur in the transaction of mercantile business.[1] Licensee of Patent.

An estoppel also arises in the case of Bailor and Bailee upon the analogy of the preceding cases. A bailee is not permitted to deny that his bailor had, at the time the bailment commenced, authority to make the bailment, but he may shew that the bailor's title has expired, or that some other person is the owner of the goods. If the bailee delivers the goods bailed to the real owner, he may, as against the bailor, shew that such a person had a right to them. This is called pleading the *jus tertii*.[2] Bailor and Bailee.

Various forms of estoppel under the Contract Act arising out of the relation of Vendor and Purchaser will require examination. A vendor, who has recognised in certain ways the title of a subsequent purchaser for value by leading the latter to suppose that he has assented to the sub-sale may be precluded from asserting his lien. The principle here appears to be analogous to that applied in the case of dealings by an ostensible owner with immoveable property. In connection with this subject the construction placed by the Courts upon sections 98 and 108 of the Contract Act has to be noticed. In this chapter will be considered, in connection with section 234 of the same Act, the case of a vendor, who by election has precluded himself from suing either a principal or an agent. The doctrine of election is another form of saying that a man may not approbate and reprobate in respect of the same matter, and in certain cases an election will be implied from conduct.[3] Vendor and Purchaser.

Certain cases of estoppel in connection with Principal and Agent, and Partners, have been dealt with together. The general principle in these cases is that a principal whose negligence has enabled his agent to cheat a third party acting with ordinary caution is responsible for the acts of such agent, and a retired or Principal and Agent. Partners.

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[1] Part I, Chapter IV.
[2] Part I, Chapter V.
[3] Part I, Chapter VI.

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dormant partner whose conduct has caused third persons to deal with the firm upon his credit is precluded from denying the authority of the ostensible partners to bind him. The question here is whether an ostensible authority can be inferred from the circumstances. The liability, to a principal, of persons who have dealt with the agent also requires notice, and the liability of an agent, who has induced others to contract with him by representing himself to be the authorised agent of another, will be discussed upon the ground of warranty or estoppel in connection with section 235 of the Contract Act. Some other estoppels will also be noticed.[1]

Negotiable Instruments. Companies.

The estoppels in connection with Negotiable Instruments[2] and Companies[3] present problems of considerable difficulty which cannot be here enumerated. They will be discussed at some length in succeeding chapters. It has been thought advisable to deal in

Matter in Writing.

a separate chapter with Estoppel arising out of Matter in Writing. Estoppel by Deed in its technical sense, as above pointed out, cannot be said to have been fully recognised in this country, and the estoppel which arises out of written agreements or from assent thereto, is, when analysed, found to be a form of Estoppel by Contract. The attitude of the Courts towards Estoppel by Deed, and the main rules which appear to be applicable when a question of estoppel arises in connection with documents, will be discussed, and certain other subjects presented which may be conveniently treated in this connection.[4]

Admissions operating as Estoppels.

Passing from the subject of Estoppel by Representation to that of Estoppel by Judgment, it would seem that Admissions in the course of Judicial Proceedings[5] form the connecting link between the two branches of Estoppel. An admission, which is similar in effect, though less in degree than an Estoppel by Representation, may be defined as a statement or course of conduct giving rise to presumptions varying in degree as to their force and effect, and sometimes at the most raising an inference as to the existence of a certain state of facts which the party against whom the admission is being used is at liberty to rebut by evidence, at other times dispensing with all evidence by shewing that the fact is already

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[1] Part I, Chapter VII.
[2] Part I, Chapter VIII.
[3] Part I, Chapter IX.
[4] Part I, Chapter X.
[5] Part I, Chapter XI.

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admitted and is conclusive upon the point at issue. In the latter case the admission has given birth to an estoppel, and the doctrine being set in motion all further enquiry *ipso facto* ceases.

Admissions made in the course of judicial proceedings.

Admissions in this country frequently arise out of statements or conduct in the course of judicial proceedings, in the pleadings, or by way of argument or evidence, or in any way so as to make out a definite case relied on by the party responsible for the admission. The rule has been stated to be that such statements or conduct can only work an estoppel as between the parties or their representatives as to such material facts as have been found affirmatively to warrant the judgment of the Court upon the issues joined ; and the other party must also have been induced to alter his position.[1] Where the admission has not resulted in affecting the legal status of the parties, or is erroneous, it will only be taken as evidence against the party making it. If this definition be correct, the matter is not far removed from Estoppel by Judgment. But it would appear that all conclusive admissions are based upon Representations and are to be referred to Conduct, and in this view of the matter the subject is closely allied to Estoppel by Representation.

Where parties have allowed a suit to be conducted upon a certain assumption in the lower Court, they will not be allowed in appeal to recede from their admissions.

Compromise of legal proceedings.

An estoppel may also arise out of the *bonâ fide* compromise of legal claims *pendente lite*, provided the agreement upon which the decree was obtained has been performed on the one side. So an undertaking not to appeal, given in good faith, and founded upon sufficient consideration, (provided it is not an agreement to oust the jurisdiction of the Courts,) will work an estoppel.

II.—Estoppel by Judgment.

Res Judicata.

The subject of *Res Judicata* remains to be considered. The rule, as recognised and acted upon in England and other civilised countries in Europe, is that in order to make an adjudication in one suit a bar to the plaintiff's proceeding in another it must be shewn—

(1) that the parties are the same in both suits ;

(2) that the thing sought to be recovered is the same ;

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[1] *Civa Rau Nanaji* v. *Jesana Rau*, 2 Mad. H. C., 31 [1864].

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(3) that the grounds upon which the claim is founded are the same ; and

(4) that the character in which the parties sue or are sued is the same.[1]

Duchess of Kingston's case.

The rule is laid down as follows in the *Duchess of Kingston's* case (1776) by Sir William de Grey[2] :—"From the variety of cases relative to judgments being given in evidence in civil suits; these two deductions seem to follow as generally true : first, that the judgment of a Court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties upon the same matter directly in question in another Court ; secondly, that the judgment of a Court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another Court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question though within their jurisdiction, nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment."[3]

And the rule is concisely stated by Lord Kenyon, C. J., in *Greathead* v. *Bromley*.[4] "Now if an action be brought, and the merits of the question discussed between the parties and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although perhaps some objection or argument might have been urged upon the first trial which would have led to a different judgment."

Recognition of the rule in India.

There is nothing technical or peculiar to the law of England in this doctrine ; it is recognised by the Civil Law and has been held by the Privy Council to be perfectly consistent with the Code of Civil Procedure.[5] Independently of the provision

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[1] *Per* Garth, C. J., in *Denobundhoo Chowdhry* v. *Kristomonee Dossee*, I. L. R., 2 Calc., 152 (157) [1876].

[2] Chief Justice of the Common Pleas, afterwards Lord Walsingham.

[3] Smith's Leading Cases, 9th ed., Vol. ii, pp. 813, 814.

[4] 17 East., 456 [1798].

[5] Act VIII of 1859, s. 2; *Khugowlee Singh* v. *Hossein Bux Khan*, 7 B. L. R., 673 (678) [1871]; section 2 of Act VIII of 1859 ran as follows :—"The Civil Courts shall not take cognizance of any suit brought on a *cause of action* which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

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in the Code of 1859, the Courts in India recognised the rule and applied it in a great number of cases, and the re-enactment of the provision in the Code of 1877 appears to have been made with the intention of embodying in sections 12 and 13 of that Code, the law then in force in India, instead of the imperfect provision in section 2 of Act VIII of 1859.[1] The provision in the present Code corresponds very nearly with that in the Code of 1877.

Judgments *in personam*.

The doctrine of *res judicata* requires to be considered first with reference to judgments *in personam*, that is, binding upon individuals and not upon the world at large: Adopting the division in *Denobundhoo Chowdhry's* case the subject falls into four different topics: (*a*) forum; (*b*) parties; (*c*) subject-matter; (*d*) cause of action.

Forum.

(*a*) *Forum*.[2]—The decision in the former case must have been a final decision of a Court of competent jurisdiction. Competent to try means competent to try with conclusive effect,[3] and is to be construed with reference to the jurisdiction of the Court at the time the suit was brought.[4] Competent is equivalent practically to concurrent, and means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is sought to be used as conclusive.[5] Concurrent jurisdiction means concurrent as regards pecuniary limit as well as subject-matter, otherwise the lowest Court in India might determine finally and without appeal the title to the greatest estate in the Indian Empire.[6] A decision is final[7] when it is such that the Court making it could not alter it (except on review) on the application of a party or reconsider it of its own motion, and a decision open to appeal may be final until the appeal is made.[8] The Court must have exercised its judicial mind and come to a conclusion that one side is right and pronounced a decision accordingly.[9]

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[1] *Misir Raghobar Dial* v. *Raja Sheo Baksh Singh*, I. L. R., 9 Calc., 439 (445); L. R., 9 I. A., 197 (202, 4) [1882].

[2] Part II, Chapter II.

[3] *Bholabhai* v. *Adesang*, I. L. R., 9 Bom., 75 [1884].

[4] *Raghunath Panjah* v. *Issur Chunder Chowdhry*, I. L. R., 11 Calc., 153 [1884].

[5] *Misir Raghobar Dial* v. *Raja Sheo Baksh Singh*, L. R., 9 I. A., 197 [1882].

[6] *Run Bahadur Singh* v. *Lucho Koer*, I. L. R., 11 Calc., 301 (309); L. R., 12 I. A., 23 (38) [1884].

[7] Part II, Chapter VI.

[8] Act XIV of 1882, s. 13, Expl. IV.

[9] *Jenkins* v. *Robertson*, L. R., 1 H. L. (S. C.), 117 (123) [1867]. See *In re* South American, &c., Co., L. R., '95, 1 Ch., 45, 46.

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Parties.

(*b*) *Parties.*[1]—A decree obtained without fraud binds the parties to a suit, their privies, and representatives. Section 13 of the Code[2] recognises decrees or judgments as binding upon the parties to a suit or persons claiming under those parties, or, in the language of the English law, their *privies*. Persons represented by the parties, as, for instance, those interested in the estate of a testator or intestate, or the members of a joint-family, are not expressly recognised. Strangers to a suit are in no way affected by the decision unless it is within the limited class of cases known as judgments *in rem*. The effect of Fraud upon judgments will be considered hereafter.

Subject-matter.

(*c*) *Subject-matter.*[3]—The thing sought to be recovered in both suits (*idem corpus, quantitas eadem*) must be the same, or, in other words, the matter in respect of which *res judicata* is said to operate so as to bar a subsequent suit must have been directly and substantially in issue in the former suit.[4] The matter must not be incidentally or collaterally in issue, or subsidiary to the main question, or merely to be inferred by argument,[5] but must have been alleged by one party in the former suit and either denied or admitted expressly or impliedly by the other,[6] and any matter which might and ought to have been made ground for defence or attack in that suit must be deemed to have been directly and substantially in issue.[7]

Cause of action.

(*d*) *Cause of action.*[8]—The cause of action must be the same (*eadem causa petendi*), that is, the grounds which are the foundation of the right to sue (*idem jus*), in other words, the remedial right by which relief is claimed, must have been the same in both cases; and any relief claimed in the plaint which is not expressly granted by the decree in the former suit must be deemed to have been refused.[9] The expression "cause of action" is to be construed with reference to the substance rather than the form of

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[1] Part II, Chapter III.

[2] "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

[3] Part II, Chapters IV and V.

[4] Act XIV of 1882, s. 13.

[5] *Run Bahadur Singh* v. *Lucho Koer*, I. L. R., 11 Calc., 301; L. R., 12 I. A., 23 [1884]; *Musst. Edun* v. *Musst. Bechun*, 8 W. R., 175 (179) [1867].

[6] Act XIV of 1882, s. 13, Expl. i.

[7] *Ib.* Expl. ii. That is to say, matters constructively in issue.

[8] Part II, Chapter I.

[9] Act XIV of 1882, s. 13, Explanation iii.

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the action,[1] and refers to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour ;[2] the precise form in which the action is brought being immaterial, provided the same right and title was substantially in issue in both suits.[3]

Judgment *in rem*.

Judgments *in rem*, in the sense that the findings and grounds of decision bind *inter omnes*, are probably to be regarded as limited to one class of cases—the adjudications of Admiralty Courts in prize causes where all the world are regarded as being parties.[4] Since the decision of the Appeal Court in *De Mora* v. *Concha*[5] and of the House of Lords in *Concha* v. *Concha*,[6] it will in all probability be held that the generally received kinds of judgments *in rem*, with the one exception above noticed, operate *in rem* against all persons only so far as the judgment itself is concerned, and beyond the judgment only parties and their privies will be within the estoppel.[7]

In *Jogendro Deb Roykut* v. *Funindro Deb Roykut*[8] the Judicial Committee observed : "Their Lordships do not think it necessary to embarrass themselves with much discussion with respect to the nature of a judgment *in rem*, technically so called. It appears to them extremely doubtful whether there exists in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize) any ordinary Court capable of giving, what can be called technically a judgment

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[1] *Rajah of Pittapur* v. *Sri Raja Row Buchi Sittaya Guru*, L. R., 12 I. A , 16 [1884] ; *Soorjomonee Dayee* v. *Suddanund Mohapatter*, 12 B. L. R., 304 [1873].

[2] *Musst. Chand Koer* v. *Partab Singh*, L. R., 15 I. A., 156 (158) [1888].

[3] *Srimoti Kamini Debi* v. *Ashutosh Mookerjee*, L. R., 15 I. A., 159 [1888].

[4] *Bernardi* v. *Motteux*, 2 Doug., 580 [1781].

[5] L. R., 29 Ch. D., 268 [1885].

[6] L. R., 11 Ap. Ca., 541 [1886]. It was held approving the decision of the Court of Appeal that an *unnecessary* finding of a Probate Court as to the domicile of a testator was not binding upon persons in reality not parties to the probate proceedings or properly represented there by the testator. In an American case [*Brigham* v. *Fayerweather*, 140 Mass., 411] it was held that a *necessary* finding as to the capacity of the testator in a probate cause was not conclusive in an action between one of the parties to the probate cause and a third person who held a deed from the testator.

[7] See an instructive note on the subject by Mr. Bigelow in the *Law Quarterly Review*, Vol. ii, 406. The history and position of judgments *in rem* in this country prior to the Evidence Act is noticed in the Chapter on Judgments *in rem*, Part II, Chapter VII. See *Yarakalamma* v. *Anakala Naramma*, 2 Mad. H. C. R., 276 [1864] ; see also *Kanhya Lall* v. *Radha Churn*, 7 W. R., 338 [1867] ; *Jogendro Deb Roykut* v. *Funindro Deb Roykut*, 14 M. I. A., 373 [1871] ; *Ahmedbhoy* v. *Vulleebhoy*, I. L. R., 6 Bom., 703 [1882].

[8] 14 M. I. A., 373 [1871].

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in rem." This view had been previously taken by Sir Barnes Peacock in *Kashya Lall* v. *Radha Churn*,[1] a case with reference to which section 41 of the Evidence Act was framed.

The subject of judgments *in rem* is considered further below.[2] For the purposes of the present chapter it is sufficient to state that a judgment, order, or decree, in order to operate *in rem* must be a final judgment of a competent Court made in the exercise of Probate, Matrimonial, Admiralty or Insolvency Jurisdiction. It should, however, be premised that the expression "judgment *in rem*" is nowhere used in the Evidence Act.

Foreign judgments *in personam*.

Foreign judgments *in personam*[3] have frequently been enforced by suit in this country, being considered to impose a duty or obligation which the Courts are bound to give effect to. The law on this subject, with one exception to be noticed hereafter, has followed the precedents laid down by the English Courts. The English Case-law must therefore be referred to when any new point arises for decision. There are, however, enactments relating to foreign judgments, the method of enforcing them by suit, and the cases in which they may be pleaded as a bar to suits.[4] In addition to the ordinary doctrines of *res judicata*, there are certain special rules applicable to foreign judgments which will have to be considered.

Enforceable by suit.

The general rules relating to the enforcement of foreign judgments are that the judgment must conclusively establish the debt and must be final and unalterable in the Court which pronounced it before it can operate as *res judicata*; and if this is the case the judgment cannot be re-examined upon the merits to shew that the Court was in error on the facts or the law; fraud and want of jurisdiction, however, are good grounds for impeaching a foreign judgment.

May be pleaded in bar.

A somewhat different set of rules is applicable where a foreign judgment is pleaded by way of defence to a suit; such a judgment may be attacked upon the merits or as disclosing errors in law, as well as upon the ground of fraud or as contrary to natural justice.[5]

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[1] 7 W. R., 338 [1867].

[2] Part II, Chapter VII. See Evidence Act, s. 41.

[3] Part II, Chapter VIII.

[4] Act XIV of 1882, ss. 2, 12, 13, Expl. vi, 14; Evidence Act (I of 1872), ss. 78 (6), 82, 86.

[5] See Act XIV of 1882, s. 13, as amended by Act VII of 1888, s. 5. The subject is discussed below, Part II, Chapter VIII.

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Treatment of the subject.

From the short foregoing sketch the limits of the subject may be seen. The development of the doctrines of Estoppel in this country has followed the course of business, and the conditions of life with which the Courts have to deal, and many new applications of the doctrines have arisen. The law is chiefly Case-law unincumbered by frequent Legislative interference. The doctrines of Estoppel as introduced into India have been from the first worked with a disregard of pure technicality and with a view to their beneficial application. Codification has grown out of, and received shape from, existing Case-law instead of preceding and endeavouring to anticipate it. It follows, therefore, that the subject stands clear of history, and the old division adopted in English and American text-books may be disregarded as technical and obsolete, the subject being treated with regard to its natural development. An attempt has been made to arrange the cases under each branch of the law, and this method will, it is conceived, conduce to more practical usefulness than the adoption of any treatment founded either upon Jurisprudence or History.

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PART I.

MODERN OR EQUITABLE ESTOPPEL.

CHAPTER I.

ESTOPPEL BY REPRESENTATION.

Doctrine of *Derry* v. *Peek* [1889] has no application—Estoppel defined in relation to innocent representations—Estoppel is not a cause of action but a rule of evidence—*Low* v *Bouverie* [1891]—Representations—Doctrine of changed situations—Representation must be of existing facts—The same representation may constitute a term in a contract and may work an estoppel—Generally amounts to contract or license—Privity—Estoppel by conduct—Effect of representation chiefly to be considered—Classification according to intention—Propositions in *Carr* v. *London and North-Western Railway Co.* [1875]—Inference from conduct—Proximate cause—Development of the modern doctrine—*Pickard* v. *Sears* [1837]—*Freeman* v. *Cooke* [1848]—*Sarat Chunder Dey* v. *Gopal Chunder Laha* [1892]—Evidence Act, s. 115—Attitude of the Indian Courts—*Ganges Manufacturing Co.* v. *Sourujmull* [1880]—*Gunga Sahai* v. *Hira Singh* [1880] and *Vishnu* v. *Krishnan* [1883] overruled by the Privy Council [1892]—There may be estoppel without fraud—Authoritative exposition of the doctrine of estoppel by representation in *Sarat Chunder Dey's case*—Classification according to intention, cases presented—Active misrepresentation—Illustrations—Conduct of culpable negligence—*Seton* v. *Lafone* [1887]—*Coventry* v. *Great Eastern Railway Co.* [1883]—*Carr* v. *London and North-Western Railway Co.* [1875]—Conduct of indifference or acquiescence—Inference from conduct—Acquiescence—Standing by—Knowledge of legal rights not the true criterion—Sometimes the relation of trust is created.

The doctrine of Derry v. Peek has no application to estoppel by representation.

BEFORE analysing the representations upon which Estoppels are founded it is necessary to repeat, (and this will keep the subject clear of the controversy which has taken place upon the subject of innocent or negligent representations,) that an estoppel does not give rise to a cause of action, but is a rule of evidence by which one party is assisted to relief owing to his opponent being estopped from denying the truth of something which he has said or done. In such a case the estoppel fills up a gap in the evidence and, by preventing either plaintiff or defendant from disputing a particular fact alleged, becomes effective, either by furthering the action to a successful issue, or by annihilating and destroying it.[1] The subject,

[1] *Low* v. *Bouverie*, L. R., 3 Ch., 82 [1891].

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therefore, stands clear of the doctrine established by the House of Lords in *Derry* v. *Peek*,[1] that a person is not liable upon a false representation upon the faith of which another person acts, although such representation is negligently made, provided it is made in the honest belief that it is true. The two doctrines are of an entirely different nature, and it will be seen that a party to a suit may be estopped by reason of conduct to which no suspicion of fraud attaches, the Courts looking rather to the position of the party affected by the representation than to the motives or intentions of the party making the representation.[2]

Low *v.* Bouverie [1891].

The position of estoppels in relation to innocent representations[3] is very clearly defined in the recent case of *Low* v. *Bouverie*,[4] where Lord Justice Kay points out that, since *Freeman* v. *Cooke*,[5] it has been recognised that a statement made by a man with the intention that it should be acted upon, and which is acted upon accordingly, is binding upon him, so that he is precluded from contesting its truth, although it was not fraudulently made; and the Lord Justice gives the result of the authorities as follows:—

Estoppel defined in relation to innocent misrepresentations.

"1. There has been from ancient time a jurisdiction in Courts of Equity in certain cases to enforce a personal demand against one who made an untrue representation upon which he knew that the person to whom it was made intended to act, if such person did act upon the faith of it and suffered loss by so acting.

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[1] L. R., 14 Ap. Ca., 337 [1889].

[2] *Sarat Chunder Dey* v. *Gopal Chunder Laha*, L. R., 19 I. A., 203; I. L. R., 20 Calc., 296 [1892].

[3] *Derry* v. *Peek* has recently been explained in the Court of Appeal in *Angus* v. *Clifford*, L. R., '91, 2 Ch., 449, and in *Low* v. *Bouverie* above cited. In the latter case Bowen, L. J., observed [L. R., '91, 3 Ch., 105]: "As to *Derry* v. *Peek*, I think, as we have already had reason more than once to explain, it decides two things, and two things only. First, the point of Common Law required no elaboration, namely, the point that an action for deceit or fraud, properly so-called, would only lie at law for a fraudulent misrepresentation—a fraudulent allegation that a fact existed which did not exist, in the truth of which representation the person making it had no genuine or honest belief. That was the rule at Common Law. But *Derry* v. *Peek* decides; secondly, that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful enquiry. In *Derry* v. *Peek*, the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that if the duty is assumed to exist, there must be a remedy for its non-performance.....But *Derry* v. *Peek* leaves, as [Lord Justice Lindley] has said, altogether untouched, first of all the case of warranty; and secondly, cases of estoppel."

[4] L. R., '91, 3 Ch., 82 (111—113).

[5] 2 Ex., 654 [1848].

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"2. This was readily done where the representation was fraudulently made, in which case an action of deceit would lie at law.

"3. Relief will also be given at Law and in Equity, even though the representation was innocently made without fraud, in all cases where the suit will be effective if the defendant is *estopped* from denying the truth of his representation.

"4. Where there is no estoppel, an innocent misrepresentation will not support an action at law for damages occasioned thereby.

"5. Estoppel is effective where an action must succeed or fail if the defendant or plaintiff is prevented from disputing a particular fact alleged: for example, if an assign of A sues A's trustee to recover the fund assigned, and the trustee is prevented from denying its existence in his hands; or at law, if the assign of a debt should sue the alleged debtor, and he was prevented from denying that the debt was due. Or in the converse case, an estoppel may be a defence; as if a joint-stock company were to sue a shareholder for calls, and they were estopped from denying that the shares were paid up, their action would fail. It is obvious that this rule does not apply to an action for deceit. In such an action the plaintiff relies, not on the truth of the statement, but upon its falsehood; and he is bound to prove not only that the representation was untrue, but also that it was made fraudulently.

"6. I am not satisfied that relief in the nature of a personal demand against the defendant has been given in Equity in cases which did not involve fraud, or to which this doctrine of estoppel would not apply."

Estoppel is not a cause of action but a rule of evidence.

In the same case Lord Justice Lindley[1] said:—"But estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself;" and Lord Justice Bowen added[2]:—"But we must be guarded in the way in which we understand the remedy when there is an estoppel. Estoppel is only a rule of evidence: you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said."

[1] L. R., '91, 3 Ch., 101. [2] *Ib.*, 105.

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Representations.

It now becomes necessary to examine more closely the various kinds of REPRESENTATIONS which may amount to an estoppel. It has been seen that representations may operate either as part of a contract, or apart from contract under the general law of estoppel.[1]

Doctrine of changed situations.

In *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*,[2] Lord Selborne, L. C., describes the foundation of the doctrine of equitable estoppel by representation[3] as follows: "The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the *situation* after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true, and shall be compelled to make them good. But those must be representations concerning existing facts."[4]

The same representation may constitute a term in a contract and may work an estoppel.

The line between contract and estoppel may perhaps be explained by saying that "most of the cases . . . when looked at,

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[1] "It seems to me that every representation, false when made or falsified by the event, must operate in one of three ways if it is to produce any legal consequences. First, it may be a term in a contract, in which case its falsity will, according to circumstances, either render the contract voidable or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation. Secondly, it may operate as an estoppel preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it. Thirdly, it may amount to a criminal offence. The common case of a warranty is an instance of a representation forming part of a contract. *Pickard* v. *Sears* [6 A. & E., 469 (1837)], and many other well-known cases are instances of representations amounting to an estoppel. A false pretence by which money is obtained is an instance of a representation amounting to a crime"—*per* Stephen, J., in *Alderson* v. *Maddison*, L. R., 5 Ex. D., 293 (296) [1880].

[2] L. R., 6 E. & I. A., 352 (360) [1873].

[3] "It is a doctrine not confined to cases in equity, but one which prevails at law also; and there are, in fact, more cases upon the subject at law than in equity"—*per* Lord Cranworth in *Jorden* v. *Money*, 5 H. L. Ca., 213 [1854].

[4] In *Rajnarain Bose* v. *Universal Life Assurance Co.*, I. L. R., 7 Calc., 594 [1881], it was held that Section 115 of the Evidence Act refers to belief in a fact and not in a proposition of law. Cf. *Gundam Venkatasami* v. *Chinnôm*, 5 Mad. H. C. R., 466 [1870], a curious case.

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if they do not absolutely amount to contract, come uncommonly near it."[1] In equity a representation may be so made as to constitute the ground of a contract. Where a person makes a representation of what he says he has done, or of some existing fact, as an inducement for other persons to act upon it and they do so act, equity will bind him by such representation treating it as a contract.[2] In this case an estoppel is available when the question arises as to what evidence is necessary to further or defeat the contentions of the parties. "One and the same statement may well be a deceit, and a breach of contract, and capable of operating as an estoppel."[3] Or if the representation does not amount to a contract, it may still give rise to an estoppel.

Representation must be as to existing facts

But the doctrine of estoppel by representation only applies to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro* which, if binding at all, must generally be binding as contracts.[4]

and generally amount to an agreement or license.

In most cases in which the doctrine in *Pickard* v. *Sears*[5] has been applied, the representation is such as to amount to the

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[1] *Brownlie* v. *Campbell*, L. R., 5 Ap. Ca., 952 [1880], *per* Lord Blackburn. See Pollock on Contract, 5th ed., Appendix, Note K. In *Low* v. *Bowerie*, Lindley, L. J., observes: "As pointed out by Lord Blackburn, in *Brownlie* v. *Campbell*, the line between fraud and warranty is often very narrow, and the same observation is true of the line between warranty and estoppel. Narrow, however, as the line often is the three words denote fundamentally different legal conceptions which must not be confounded." L. R., '91 3 Ch., 102.

[2] *Maunsell* v. *Hedges White*, 4 H. L. Ca., 1039 (1055) [1854], *per* Lord Cranworth.

[3] Pollock on Contract, 5th ed., 506.

[4] *Per* Selborne, C., in *Maddison* v. *Alderson*, L. R., 8 Ap. Ca., 467 (473): "Besides these there is a class of false representations which have no legal effect. These are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites the expectation that it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, contract to fulfil it. It will, I think, be found that all the difficulties of the subject may be solved by keeping in mind this classification (see note 3 at p. 31) of the different classes of false representations"—*per* Stephen, J., in *Alderson* v. *Maddison*, L. R., 5 Ex. D., 293 (296). See *McEvoy* v. *The Drogheda Harbour Commissioners*, 16 W. R. (English), 34 [1867]; *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, L. R., 6 E. & I. A., 352 [1873]; *Jorden* v. *Money*, 5 H. L. C., 185 (213, 4, 5) [1854]; *Mills* v. *Fox*, L. R., 37 Ch. D., 153 [1887], Pollock on Contract, Appendix, Note K. *Gopee Lall* v. *Musst. Sree Chundraolee Buhojee*, 19 W. R., 12 (13) [1873]; *Rajnarain Bose* v. *Universal Life Assurance Co.*, I. L. R., 7 Calc., 594 [1881].

[5] 6 A. & E., 469 [1837].

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contract or license of the party making it,[1] and the party availing himself of the estoppel acquires a right or title thereby against the party making the representation.[2] It is necessary that there should be privity between the parties, that is to say, an estoppel is only available between the parties to the representation, and those claiming under them,[3] and estoppels must also be mutual[4].

Estoppel binds parties and privies.

The rule is generally stated with reference to the conduct of the person making the representation. "If any person by actual expressions so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using the language or so conducting himself cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."[5]

Estoppel by conduct.

Representations in connection with estoppel have generally been classified according to the intention or motive of the person making them. A person may be prevented from denying a certain state of facts if he has made either a fraudulent misrepresentation, or made a false statement without fraud but negligently, or

Effect of representation is chiefly to be considered.

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[1] *Per* Parke, B., in *Freeman* v. *Cooke*, 2 Ex., 654 [1848]: "No doubt unless the representation amounts to an agreement or license or is understood by the party to whom it is made as amounting to that, the rule would not apply." *Cornish* v. *Abington*, 4 H. & N., 555 [1859]. "If you choose to say, and to say without enquiry, 'I warrant that,' that is a contract. If you say, 'I know it,' and if you say that in order to save the trouble of inquiring, that is a false representation—you are saying what is false, to induce them to act upon it." *Brownlie* v. *Campbell*, L. R., 5 Ap. Ca., 953 [1880]. *Per* Lord Blackburn: "Estoppel only applies to a contract *inter partes*, and it is not competent to parties to estop themselves or anybody else in the face of an Act of Parliament"—*per* Bacon, V. C., in *Barrow's case*, L. R., 14 Ch. D., 432 (441) [1880].

[2] *Per* Cotton, L. J., in *Simm* v. *Anglo-American Telegraph Co.*, L. R., 5 Q. B. D., 188 (213) [1879].

[3] *Middleton* v. *Pollock*, L. R., 4 Ch. D., 49 [1876]. A matter which is *res inter alios acta* cannot operate as an estoppel. *The Queen* v. *Ambergate &c. Co.*, 1 El. & B., 372 [1853]. In *Board* v. *Board*, L. R., 9 Q. B., 48 [1873], R A, a tenant by the curtesy, having nothing to devise, made a will, leaving the property to R for life, with remainder to W in fee. R entered as devisee and let the defendant into possession. The plaintiff, the assignee of W, brought an ejectment. The Court of Queen's Bench held that the defendant being privy in estate to R, who claimed under the will, was subject to all the estoppels which would have estopped R, and could not say that the will was void and that, the heir-at-law being barred, R had acquired the fee by twenty years' undisturbed possession. "It is contrary to the law of estoppel," said Blackburn, J., "that he who has obtained possession under and in furtherance of the title of a devisor should say that such title is defective."—See *Ranga Rau* v. *Bhavayammi*, I. L. R. 17 Mad., 473 [1894]; *Syud Ameer Ali* v. *Syef Ali*, 5 W. R., 289 [1866].

[4] *Spencer* v. *Williams*, L. R, 2 P. & M., 230 (237) [1871]; *Heane* v. *Rogers*, 9 B. & C., 577 (586) [1829].

[5] *Cornish* v. *Abington*, 4 H. & N., 555 (556) [1859].

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has made a false representation without fraud or negligence.[1] But it appears to be more correct to say that the determining element in all such cases is not the motive with which the representation was made, or the state of knowledge of the party making it, but the *effect* of the representation as having caused another person to act on the faith of it.[2]

Classification according to intention.

Representations in connection with estoppel may, for the purposes of this discussion, be classified according to the (*a*) deliberate representation with knowledge of its falsehood of the party making the representation ; (*b*) conduct of culpable negligence of the party making the representation ; (*c*) indifference or acquiescence of the party making the representation.[3]

Propositions in Carr v. The London and N.-Western Railway Co. [1875]. Active misrepresentation.

The propositions laid down in *Carr* v. *The London and North-Western Railway Co.*[4] may be reduced to the above classification. These propositions may be paraphrased shortly as follows :—

A, by words or conduct, wilfully endeavours to cause B to believe in a certain state of facts which A *knows* to be false. Then if B believes in that state of things and acts upon his belief, A having knowingly made a false statement, is estopped from averring afterwards that such a state of things did not in fact exist.[5]

Conduct of culpable negligence.

A, by conduct of culpable negligence calculated to lead B into the belief of a certain state of facts, causes B to so believe and

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[1] *Per* Brett, M. R., in *Seton* v. *Lafone*, L. R., 19 Q. B. D., 70 [1887].

[2] *Sarat Chander Dey* v. *Gopal Chunder Laha*, L. R., 19 I. A., 203 ; I. L. R., 20 Calc., 296 [1892].

[3] If a person makes to another, either in express terms or by conduct, a material or definite statement of fact which is false, intending that person to rely on it, and he does rely on it, and is thereby damaged, then the person making the statement is liable to make compensation to the person to whom it is made : (*a*) if it is false to the knowledge of the person making it ; (*b*) if it is untrue in fact and made recklessly ; (*c*) if it is untrue in fact and not believed to be true, or believed to be true without any reasonable grounds. See the remarks of Lopes, L. J., in *Peek* v. *Derry*, L. R., 37 Ch. D., 541 (585) [1887], as to "misrepresentations fraudulent in contemplation of law."

[4] "Estoppels may arise, on various grounds, all of which the judgment in *Carr.* v. *The London and North-Western Railway Co.* [L. R., 10 C. P., 307] endeavours to state, and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others. An estoppel does not in itself give a cause of action ; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent representation, and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud, and another man acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel." *Per* Brett, M. R., in *Seton* v. *Lafone*, L. R., 19 Q. B. D., 68 (70).

[5] Proposition 1, L. R., 10 C. P., at p. 316.

to act by mistake upon such belief to his prejudice, such conduct of culpable negligence on A's part being the proximate cause of B's so acting. Then A cannot be heard afterwards, as against B, to shew that the state of facts referred to did not exist.[1]

Two propositions remain to be classified under the third head.

Conduct of indifference or acquiescence by which other parties are led to *infer* the existence of a certain state of facts.

A, either in express terms or by conduct, makes a representation to B of the existence of a certain state of facts which he either does not believe to be true or has no positive belief either way, but nevertheless he intends it to be acted upon in a certain way. B does so act to his damage in that belief. Then A is estopped from denying the existence of that state of facts.[2]

A so conducts himself that a reasonable man would take his conduct to mean a certain true representation of facts intended to be acted on in a particular way. B does so act in that belief to his damage. Then A may not deny that the facts were as represented.[3]

Inference from conduct.

In the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*[4] their Lordships of the Privy Council point out that there may be statements made, and which have induced another party to do that which he would have otherwise abstained from doing, which cannot properly be characterised as misrepresentations at all, where the conduct of one party has led another to draw certain inferences, and to act upon such inferences. "If a party *uses language* which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound, if another, so understanding it, has acted upon it."[5] And where a person *has conducted himself* so as to mislead another, he cannot gainsay the reasonable inference to be drawn from his conduct.[6]

'Proximate' or 'Real.'

The above propositions were approved in the case of *Coventry* v. *Great Eastern Railway Co.*[7] and in the case of *Seton* v. *Lafone*.[8] In the latter case the Master of the Rolls qualified the expression 'proximate' in the proposition as to negligence, explaining that expression to mean 'real,' and his opinion was concurred in by

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[1] Proposition 1, at p. 318 of the report.
[2] Proposition 2, at p. 317.
[3] Proposition 3, at p. 317.
[4] L. R., 19 I. A., 203; I. L. R., 20 Calc., 296 [1892].
[5] *Per* Pollock, C. B., in *Cornish* v. *Abington*, 4 H. & N., 549 (555) [1859].
[6] *Ib.*
[7] L. R., 11 Q. B. D., 776 [1883].
[8] L. R., 19 Q. B. D., 68 [1887].

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Lopes, L. J. The remarks of Brett, M. R., which are of historical importance, are quoted in the foot-note.[1]

Development of the modern doctrine.

As before stated this classification does not greatly assist the elucidation of the subject, but the analysis of the doctrine of estoppel has generally started with the question of intention or motive; hence, most of the authoritative definitions or descriptions have proceeded upon that basis. In subsequent chapters an attempt will be made to shew the application of the doctrine in the various branches of the law in India, having regard to the *position* of the party affected. At present, however, it is necessary to trace the growth of the rule in equity, and to illustrate its application, and to present the main features of the subject.

Pickard *v.* Sears [1837].

The case of *Pickard* v. *Sears*[2] is described by Mr. Bigelow as bearing the same relation to estoppel *in pais* as the *Duchess of*

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[1] "Before framing the propositions in *Carr* v. *The London and North.-Western Railway Co.* [L. R., 10 C. P., 307], I had referred, I think, to nearly all the cases on the subject, and sought to derive from them the different propositions relating to the law of estoppel. The word 'proximate' was taken from the judgment in *Swan* v. *North British Australasian Co.* [2 H. & C., 175 (1863)]. In that case Mellor, J., said that the question was what was the culpable conduct which had been the proximate cause that the defendant had registered a forged transfer as genuine; and that the false representation was that of the broker and not of the plaintiff, and the proximate cause which induced the company to alter their position to their prejudice was the fraudulent and felonious conduct of the broker and not the negligence of the plaintiff. In the same case Blackburn, J., said: "What I consider the fallacy of my Brother Wilde's judgment is this: he lays down the rule in general terms 'that if one has led others into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards as against such persons to shew that state of facts did not exist.' This is very nearly right, but in my opinion not quite; as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading of the party into that mistake." It was on the strength of these observations that I put the word 'proximate' into the proposition which I have quoted. I think it is clear on reference to the facts of *Swan* v. *North British Australasian Co.* [2 H. & C., 175], that the word 'proximate' was there used as meaning the 'real cause.' It was no doubt true, in that case that there had been negligent conduct by the plaintiff which was in one sense a cause, but was not the real cause, of the defendant's action, because it would have had no effect unless there had intervened the fraudulent and felonious act of the broker. The meaning read by the light of these facts is clear enough, but I think I should prefer to insert in the proposition the word 'real,' instead of the word 'proximate'" [*per* Brett, M. R., at pp. 70, 71]. In the above remarks Lopes, L. J. concurred. Fry, L. J., however, doubted, "I will not attempt to give any paraphrase of the word 'proximate.' The doctrine of causation involves much difficulty in philosophy as in law; and I do not feel sure that the term 'real' is any more free from difficulty than the term 'proximate'" [*per* Fry, L. J., at p. 74].

[2] 6 A. & E., 469 [1837]. In *White* v. *Greenish*, 11 C. B. [N. S.], 229 [1861], Erle, C.J., states that the doctrine is two or three centuries earlier. But its accurate definition is extremely recent.

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Kingston's case does to estoppel by record. That was an action of trover for machinery and other articles brought by the mortgagee of one Metcalfe, the former owner, against a purchaser from the sheriff under an execution levied against Metcalfe, who had remained in possession carrying on his trade until the execution issued. It appeared that Pickard, the mortgagee, after he knew that the sale was in contemplation, came to the premises and gave no notice of his claim, but, on the contrary, called on the execution-creditor's attorney with Metcalfe, and consulted with him as to the course to be taken. Pickard, however, never mentioned the mortgage or claimed the goods as his own. The defendant purchased the goods *bonâ fide* and in total ignorance that Pickard had any interest. On the trial before Denman, C.J., the plaintiff obtained a verdict. Subsequently the defendant obtained a rule *nisi* for a new trial on the ground that the plaintiff had virtually authorised the sale, and was estopped from relying on his mortgage, the cases of *Graves* v. *Key*[1] and *Heane* v. *Rogers*[2] being relied on. Denman, C.J., in delivering the judgment of the Court, made certain observations which have now become classical.

Statement of the rule.

"Much doubt," said the learned Chief Justice, "has been entertained whether these acts of the plaintiff, however culpable and injurious to the defendant, and however much they might be evidence of the goods not being his, in the sense that any persons (and amongst others the defendant) would be naturally induced thereby to believe that they were not, furnished any real proof that they were not his. His title having been once established, the property could only be divested by gift or sale, of which no specific act was even surmised.

"But the rule of law is clear, that, where one by his words or conduct *wilfully*[3] causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; and the plaintiff, in this case, might have parted with his interest in the property by verbal gift or sale, without

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[1] 3 B. & Ad., 318 note (*a*) [1832].

[2] 9 B. & C., 577 (586) [1829].

[3] 'Wilfully' is equivalent to 'voluntarily,' *per* Pollock, C. B., in *Cornish* v. *Abington* [4 H. & N., 549 (1859)]. See *Sarat Chunder Dey* v. *Gopal Chunder Laha*, *infra*, p. 39.

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any of those formalities that throw technical difficulties in the way of legal evidence. And we think his conduct, in standing by and giving a kind of sanction to the proceedings under the execution, was a fact of such a nature, that the opinion of the jury ought, in conformity to *Heane* v. *Rogers*[1] and *Graves* v. *Key*,[2] to have been taken, whether he had not, in point of fact, ceased to be the owner." The rule for a new trial was accordingly made absolute.

Freeman v. Cooke [1848].

Subsequently, in the case of *Freeman* v. *Cooke*,[3] Parke, B., explained the rule in *Pickard* v. *Sears*[4] as follows: "That rule," said the learned Baron, "was founded on previous authorities, and has been acted upon in some cases since. The principle is stated more broadly by Lord Denman in the case of *Gregg* v. *Wells*.[5] The proposition contained in the rule itself, as above laid down in the case of *Pickard* v. *Sears*, must be considered as established. By the term '*wilfully*,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representation to

[1] "There is no doubt that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction; but as to third parties he is not bound. It is a well established rule of law, that estoppels bind parties and privies, not strangers. Co. Lit. 352*a*, Com. Dig. Estoppel (C)."—*per* Bayley, J., in *Heane* v. *Rogers*, 9 B. & C., 577 (586) [1829].

[2] "A receipt is an *admission* only, and the general rule is that an admission, though *evidence* against the person who made it and those claiming under him, is not *conclusive* evidence, except as to the person who may have been induced by it to alter his condition [*Heane* v *Rogers* (9 B. & C., 577), and other cases, were then cited]. A receipt may therefore be contradicted or explained; and there is no case to our knowledge, in which a receipt upon a negotiable instrument has been considered to be an exception to the general rule." *Per* Tenterden, C.J., in *Graves* v. *Key*, 3 B. & Ad., 313 (318) note (*a*) [1832].

[3] 2 Ex. Rep., 654 [1848]. "The rule as explained in *Freeman* v. *Cooke* takes in all the important commercial cases, in which a representation is made, not wilfully in any bad sense of the word, not *malo animo*, or with intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way"—*per* Crompton, J., in *Howard* v. *Hudson* [2 E. & B., 1 (1853)].

[4] 6 A. & E., 474.

[5] "*Pickard* v. *Sears*," says Denman, C.J., "was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A person who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." *Gregg* v. *Wells*, 10 A. & E., 90 (97) [1839].

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be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise, to disclose the truth, may often have the same effect. As for instance, a retiring partner omitting to inform his customers of the *fact*, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised. . . . In truth, in most cases in which the doctrine in *Pickard* v. *Sears* is to be applied, the representation is such as to amount to the *contract* or *license* of the party making it."

Case of retiring partner.

A most forcible exposition of the application in this country of the rule of estoppel by representation is to be found in the recent case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*[1] in the Privy Council. The question which arose for decision was as to whether the plaintiff, claiming as purchaser from Ahmed Ali and Rahimunnessa, the heirs of one Umed Ali Shah Ostagur, was affected by an estoppel in consequence of the actings or representations of either of his vendors. It appeared that Arju Bibi, the widow of Umed Ali, claiming to hold under a *hiba* granted to her during her husband's lifetime, mortgaged the property after his death to one Kalimuddin, and the defendant's predecessors in title purchased

Sarat Chunder Dey *v.* Gopal Chunder Laha [1892].

[1] L.R., 19 I. A., 203; I. L. R. 20 Calc., 296 [1892]. A very similar case, *Syed Nurul Hossein* v. *Sheo Sahai*, L. R., 19 I. A., 221 [1892], in the same volume, is an illustration of conduct not sufficient to raise an estoppel. The plaintiff's vendor had executed a deed of sale as general mokhtar, executor, and adopted son of the widow, making a general renunciation of his title as mokhtar, but had, after the widow's death, derived title from the next reversionary heir of the last full owner (the husband of the widow). The Judicial Committee held that the fair construction of the deed was that the vendor as agent for the widow was only selling what his principal had power to sell, that there was no representation that the vendor was selling on his own account, and that the plaintiff was not estopped from suing, as he did not deny the truth of any fact represented in the deed. Nor was Section 43 of the Transfer of Property Act (IV of 1882) applicable, since the plaintiff's vendor did not represent that he was authorised to transfer, nor did he profess to transfer, any other interest than that of the widow. See *Ranga Ran* v. *Bhavayammi*, I. L. R., 17 Mad., 473 (475) [1894].

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at the execution-sale. As regards Rahimunnessa, their Lordships held that no case of estoppel was presented against her by reason of representations, acts, or omissions on her part, and that to the extent of her interest, the claim of the plaintiff to possession must be allowed.

But in regard to Ahmed the Judicial Committee were of opinion that a very different state of facts had been proved. "The facts," observed their Lordships, "as appearing on the face of the mortgage itself are, not that, Ahmed was a witness to the execution of the deed, for the witnesses were other persons, but that he really represented his mother in the whole transaction. He acted with Moonshi Golam Hossein as ammokhtar on her behalf under a power-of-attorney authorising him to do so; he signed the mortgage on her behalf and in her name; and he and Golam Hossein received the money advanced by Kalimuddin, as appears from the official certificate by the Sub-Registrar endorsed on the deed.

Conduct raising an estoppel.

"Their Lordships are very clearly of opinion that these actings on the part of Ahmed create an estoppel against him, or any one claiming in his right, from disputing the title of Arju Bibi to grant the mortgage to Kalimuddin. They amounted to a distinct declaration by him to the lender that the *hiba* in favour of Arju Bibi was a valid deed, or in any view, that if the document was open to legal objections, Ahmed as the person entitled to challenge the deed waived his right to do so, and consented for his interest to represent and to hold the *hiba* as valid, and consequently as giving a legal right to Arju Bibi as the proprietor to grant the mortgage. There was a distinct representation by Ahmed professing to act as his mother's attorney, that she was owner in possession having a good title to create a valid mortgage affecting the lands. It is, in their Lordships' opinion, impossible to take any other view of the effect of Ahmed's conduct in the whole transaction, and particularly his signing the mortgage and taking payment of the money; and it is equally clear that the transaction was concluded on the footing of that representation, and that the creditor was thereby induced to lend the money on the security of the mortgage. It has been frequently said, in cases of this class, that the creditor is bound to make enquiry into the validity of such a title as Arju Bibi, the borrower, here possessed, and the observation

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applies with great force in this case, in which the *hiba* was granted without consideration, and, as the least enquiry would have shown, without any possession having followed on it. But enquiry, or indeed any anxiety as to the title of Arju Bibi to grant the mortgage as proprietor in virtue of the *hiba* in her favour, was made quite unnecessary by the representation and conduct of Ahmed, who was (so far as his share of the property was concerned) the sole person having a title or interest to challenge the validity of the *hiba*, and to object to the granting of the mortgage which he himself signed and delivered in exchange for the money paid to him.

"In this state of the facts the terms of Section 115 of the Evidence Act directly apply to the case; for Ahmed, having by his acts and the declaration which his acts involved, intentionally caused the lender to believe that Arju Bibi as proprietor under the *hiba* was entitled to grant the mortgage, neither he nor his representative the plaintiff can be allowed to deny the truth of what was thereby represented, believed, and acted on."

Evidence Act, s. 115.

The rule of estoppel by representation is thus stated in the EVIDENCE ACT:[1] "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or representative, to deny the truth of that thing,"—and the two following sections apply this rule to the cases of a tenant, a licensee, an acceptor of a bill of exchange, and a bailee. The definition is not to be regarded as an exhaustive one, or as laying down a different rule[2] to that which is to be gathered from the English cases; and there are numerous other cases, in addition to those expressly contemplated by the Evidence Act, in which the principle of estoppel by representation has been given effect to in the Courts of this country. These cases will be considered in detail in subsequent chapters.

Attitude of the Indian Courts before

Previous to the passing of the Evidence Act, the doctrine of estoppel by representation was enunciated in various forms by the Indian Courts, and generally in a manner hostile to its technicality.

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[1] Act I of 1872, s. 115.

[2] *Sarat Chunder Dey* v. *Gopal Chunder Laha*, L. R., 19 I. A., 203; I.L.R., 20 Calc., 296 [1892].

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In *Bhyro Dutt* v. *Musst. Lekhranee Koer*[1] Paul, J., said :—"The Courts are governed by a law of far wider application than the doctrine of estoppel, that is to say, principles of justice, equity and good conscience. This very principle obliges the Court to look to the *conduct* of the party who seeks redress."

and since.

Ganges Manufacturing Co. v. Sourujmull [1880].

In the *Ganges Manufacturing Co.* v. *Sourujmull*[2] it was contended that Sections 115 to 117 of the Evidence Act contained the only rules of estoppel now intended to be in force in British India ; that those rules are treated by the Act as rules of evidence ; and that by Section 2 of the Act, all rules of evidence are repealed, except those which the Act contains. "If this argument were well founded," said Garth, C.J., "the consequences would indeed be serious. The Courts here would be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of Sections 115 to 117, however important those questions might be to the due administration of the law. The fallacy of the argument is in supposing that all rules of estoppel are also rules of evidence. The enactment is, no doubt, in one sense a rule of evidence. It is founded upon the well-known doctrine laid down in *Pickard* v. *Sears*, and other cases. In such a case the rule of estoppel becomes so far a rule of evidence, that evidence is not admissible to disprove the fact or state of circumstances that was represented to exist. But 'estoppels,' in the sense in which the term is used in English legal phraseology, are *matters of infinite variety*, and are by no means confined to the subjects dealt with in Chapter VIII of the Evidence Act. A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular arguments or contention, which the rules of equity and good conscience prevent his using against his opponent.[3] A large number of cases of this kind will be found collected in the notes to *Doe* v. *Oliver*,[4] and, whatever the true meaning of Section 2 of the

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[1] 16 W. R., 123 [1871]. See also the remarks of the same learned Judge in *Donzelle* v. *Kedarnath Chuckerbutty*, 7 B. L. R., 720 [1871]. See also *Newab Sidhee* v. *Rajah Ojoodhya Ram*, 10 Moo. I. A., 540 [1866] ; *Mohesh Chunder Chatterjee* v. *Issur Chunder Chatterjee*, 1 Ind. Jur. N. S., 266 [1866].

[2] I. L. R., 5 Calc., 669 [1880]. In *Janaki Ammal* v. *Kamalathammal* [7 Mad. H. C., 263 (1873)] it was ineffectually argued that only two sorts of estoppel were mentioned in the Evidence Act, and that that case (a case of waiver by conduct) did not fall under either of them.

[3] This last remark does not appear to be supported by authority.

[4] 2 Sm. L. Ca., 8th ed., 775.

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Evidence Act may be, as regards estoppels which prevent persons from giving evidence, we are clearly of opinion that it does not debar the plaintiffs in this case from availing themselves of their present contention against the defendants."

Ganga Sahai v. Hira Singh [1880].

A less liberal view of the section was taken by the Allahabad High Court in *Ganga Sahai* v. *Hira Singh*[1] and by a Full Bench of the Madras High Court in *Vishnu* v. *Krishnan*,[2] but this view has since been expressly discountenanced by the Judicial Committee.

Vishnu v. Krishnan [1883].

Overruled by the Privy Council [1892].

In *Sarat Chunder Dey* v. *Gopal Chunder Laha*,[3] their Lordships of the Privy Council commenting upon these cases observed: "In the former of these cases it was laid down by a majority of the Judges that if the element of fraud be wanting there is no estoppel. It was expressly said, 'There must be deception, and change of conduct in consequence.' The latter case was one in which an adoption having taken place, the alleged adopted son claimed to set aside a deed of gift of certain property by his adoptive father, granted by him late in life in favour of a stranger. The deed was liable to be set aside as *ultra vires* if the adoption was valid; but it was maintained separately that in any view the defendant was estopped from maintaining the invalidity of the adoption by a series of acts on the part of the adopting father, which had induced the belief on the part of the plaintiff that the adoption was valid, and in consequence of which the adopted son had abstained from claiming a share in the inheritance of his natural family. In the end the adoption, which was that of a sister's son, was held, after a proof of the customary law of Malabar, to have been valid; but before allowing the proof the Court decided that the case of estoppel failed.

There may be estoppel without fraud.

Vishnu v. Krishnan.

"It would be most difficult to reconcile this decision with that of the case of *Luchmun Chunder Geer Gosain* v. *Kally Churn*[4] already referred to, and the views of this Committee as there expressed; and their Lordships would also have great difficulty in

The term 'intentionally' construed.

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[1] I. L. R., 2 All., 809 [1880]. See *Uda Begum* v. *Imam-ud-din*, I. L. R., 1 All., 82 [1875], where Story's Equity Jurisprudence, Vol. ii, § 1543, is cited.

[2] I L R., 7 Mad., 3 [83]. See *Tinappa Chetti* v. *Murugappa*, I. L. R., 7 Mad., 107 [1883].

[3] L. R., 19 I. A. 203 [1892]. *Sarat Chunder Dey* v. *Gopal Chunder Laha*, L. R., 19 I. A., at p. 219.

[4] 19 W. R., 292 [1873]. See *infra*, Part I, Chapter II.

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holding, as the High Court did, that a series of acts by which an adoption is professedly made and subsequently recognised, constitute a representation in law only and not of fact. But apart from this, the Court seems to have taken the view that in order to create estoppel, the representations founded on must have been made with an intention to deceive ; and an opinion was indicated that the law of estoppel under the Indian Evidence Act in some respects differed from the law of England. It was there said[1] :—'The term "intentionally" was, no doubt, adopted advisedly. By the substitution of it for the term "wilfully" in the rule stated in *Pickard* v. *Sears* and explained in *Freeman* v. *Cooke* and *Cornish* v. *Abington*, it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it has been stated by the English Courts.' Their Lordships are unable to agree in this view. On the contrary, as the rule had been modified in England by there substituting the word 'intentionally' in the rule established for the word 'wilfully' which had been previously used, it seems to their Lordships that the term 'intentionally' was used in the Evidence Act, 1872, for the purpose of declaring the law in India to be precisely that of the law of England . . . A person who by his declaration, act or omission had caused another to believe a thing to be true and to act upon that belief, must be held to have done so 'intentionally' within the meaning of the Statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it."

Inference from conduct.

Authoritative exposition of the doctrine of estoppel by representation.

In the case now cited, Ahmed Hossein, the plaintiff's vendor, was held by the Privy Council to be estopped from challenging the validity of a *hiba*, by reason of his having represented his mother in a certain mortgage transaction, and having thereby represented to the defendant's predecessor in title that the *hiba* was valid. The view had been adopted in the lower Courts that there could be no estoppel as against Ahmed, who was a minor at the time the *hiba* was executed, and who may, at the time of the mortgage, have honestly believed that the *hiba* was genuine. There was nothing to shew that Ahmed committed any fraud or contemplated committing any. It was further held that the defendants, the purchasers

[1] *Vishnu* v. *Krishnan*, I. L. R., 7 Mad. at p. 8.

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at the mortgage-sale, were made aware of the invalidity of the *hiba* by reason of certain proceedings in the High Court, and were not therefore *bonâ fide* purchasers without notice.

Opinion of the High Court.

"Under these circumstances," observed the High Court, "we cannot hold that the Additional District Judge, either in determining as he has done, that no estoppel was created, or in holding, as he has done, that the defendants do not occupy the position of *bonâ fide* purchasers without notice, was wrong; and this absolves us from considering the further question which we might perhaps have otherwise found it necessary to determine, *viz.*, whether if Ahmed and Rahimunnessa were estopped from disputing the *hiba*, that estoppel would have been binding on the plaintiff in the absence of proof or knowledge on his part of the circumstances that gave rise to it."

Opinion of the Judicial Committee.

The Judicial Committee observed:—"With reference to the views indicated in these passages of the judgments now under review, their Lordships think it right to say that it would make no difference in the effect to be now given to the plea of estoppel against a purchaser under the mortgage-sale; though it clearly appeared that Ahmed, when he acted as he did in the mortgage transaction, was under the belief that the *hiba* was a valid deed which he could not set aside, nor is it of any moment that he neither contemplated committing any fraud, nor, in fact, committed any fraud by his acts or representations. And their Lordships must further observe that, as the mortgage was effectual as a valid title to Kalimuddin, the lender, under which, in default of payment of the money lent, he was entitled to sell the property, it follows that any purchaser from him under a sale regularly carried out would acquire a valid title to the property, even though he were fully aware of all the circumstances which had attended the execution of the *hiba*, and that it had been originally invalid.

S. 115 of the Evidence Act

"In regard to the first of these points the section of the Evidence Act, by which the question must be determined, does not make it a condition of estoppel resulting that the person, who by his declaration or act has induced the belief on which another has acted, was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. The Court is not warranted or

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entitled to add any such qualifying conditions to the language of the Act; but even if they had the power of thus virtually interpolating words in the Statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person, whose acts or declarations induced another to act in a particular way, must have been under no mistake himself, or must have acted with an intention to mislead or deceive.

represents what is the law in England.

The position of the party induced to act is to be regarded.

"What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do. The general principle is thus stated by the Lord Chancellor (Campbell), with the full concurrence of Lord Kingsdown in the case of *Cairncross* v. *Lorimer*,[1] 1860:—'The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations that if a man, either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so

Cairncross v. Lorimer[1860].

[1] 7 Jur. N. S. 149; 3 Macq., 982 [1860].

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sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

Conduct.

'I am of opinion that, generally speaking, if a party, having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.' These words were used with reference mainly to acts indicating only subsequent consent to an appointment which had been made, and which might have been objected to when originally made; but they apply *à fortiori* in a case like the present, where the person estopped was a party to the transaction itself which he, or others taking title from him, seek to challenge after a considerable interval of time.

The determining element is not the motive or the state of knowledge of the party making the representation,

"There is no ground for the suggestion that the person making the representation which induces another to act must be influenced by a fraudulent intention, to be found either in the case just referred to, or in the leading authorities of *Pickard* v. *Sears*,[1] *Freeman* v. *Cooke*,[2] and *Cornish* v. *Abington*.[3] In the more recent case of *Carr* v. *The London and North-Western Railway Company*[4] in the Appellate Court of the Common Pleas, the Master of the Rolls (Lord Esher) pointed out that no doubt in certain cases, where estoppel is successfully pleaded against a party seeking to act at variance with his previous conduct or declarations on the faith of which another has acted, the original statement may have been made fraudulently; but, as his Lordship explained, a fraudulent intention is by no means necessary to create an estoppel, and accordingly he mentions other cases or classes of cases in which the determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it. This case was approved of in the much later case of *Seton, Laing and Co.* v. *Lafone*[5]— by a unanimous judgment of Lord Esher and Lords Justices Fry and Lopes. In that case Lord Esher said: 'An estoppel does

but the effect of the representation.

[1] 6 A. & E., 469 [1837].
[2] 2 Exch., 654 [1848].
[3] 4 H. & N., 549 [1859].
[4] L. R., 10 C. P., (316) [1875].
[5] L. R., 19 Q. B. D., 68 [1887].

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not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel.' To this statement it appears to their Lordships, it may be added, that there may be statements made, and which have induced another party to do that from which otherwise he would have abstained, which cannot properly be characterized as 'misrepresentations,' as, for example, what occurred in the present case, in which the inference to be drawn from the conduct of Ahmed was either that the *hibá* in favour of Arju Bibi was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid."

Mere inference from conduct may raise an estoppel.

Sarat Chunder Dey's case marks an epoch in the subject.

The foregoing authoritative exposition of the doctrine of estoppel by representation appears to regard of less consequence the definitions based upon intention and motive noticed in the earlier portion of the chapter. The decision also marks a distinct advance in the doctrine of changed situations which, being placed upon a very broad basis, is likely to affect an increasing number of cases where confidence is reposed and betrayed. And the section of the Evidence Act, though not stated to be in conflict with the English law, can scarcely be regarded as exhaustive or precise.

Before proceeding to a detailed examination of the subject, it may be useful to illustrate the classification of representations presented in the earlier portion of the chapter.

Classification according to intention:—Cases presented.

I. And *first* as to estoppels arising out of representations made deliberately with a knowledge of their falsehood.

Active misrepresentation.

Illustrations.

In *McCance* v. *London and North-Western Railway Co.*,[1] where the plaintiff signed a declaration to the effect that the value of certain horses delivered by him for carriage to the defendants did not exceed £10 per horse, and the horses were injured owing to the defective state of the trucks, it was held that the plaintiff could not recover compensation. Bramwell, B., said: "If there

[1] 7 H. & N., 477 [1861].

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be one principle of law more clear than another, it is this, that where a person has made a *deliberate statement*, with the view to induce another to act, and he has acted upon it, the former is not at liberty to deny the truth of the statement so made. I think it would be most mischievous if he could."[1]

Mortgagee concealing lien.

In *Munnoo Lall* v. *Lalla Choonee Lall*[2] the equitable defence was set up that Munnoo Lall could not enforce his mortgage-bond against the respondents, because at the time of their purchase he had been present when the negotiations for the purchase took place, and in answer to enquiries had led the purchasers to believe that he had not any lien upon the estate. Upon the issue being raised—"Was the existence of the mortgage-deed intentionally kept secret from the defendants at the time of the purchase," and found by the lower Courts affirmatively, their Lordships of the Privy Council remarked: "The case is not put simply upon the omission to give notice, but upon an actual misleading of the defendants, not merely by the acts, but by the *express declarations* of Munnoo Lall himself. . . . . If, then, the issue has been properly found it is really decisive of the case, because it supports the plain equity, that a man who has represented to an intending purchaser that he has not a security and induced him under that belief to buy, cannot as against that purchaser subsequently attempt to put his security into force.[3]"

Agent rendering false accounts.

So if an agent employed to receive money and bound by his duty to his principal from time to time to communicate to him whether the money due to him has been received or not, deliberately and intentionally states that the money has been paid, he makes the communication at his peril, and is not at liberty afterwards to claim reimbursement in respect of those sums for which he has given credit.[4] Where a surveyor, for fear his expenditure should be thought extravagant, *knowingly* omitted certain items from the accounts, and the trustees under whom he was employed were led to act upon the false statement, it was held that he could not afterwards recover the sums omitted, both upon the above principle and upon the principle of estoppel.

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[1] 7 H. & N., 490 [1861].
[2] L. R., 1 I. A., 144 [1873].
[3] *Ib.*, 156.
[4] *Shaw* v. *Picton*, 4 B. & C., 715 (729) [1825].

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"We are of opinion," said Wilde, B., in *Cave* v. *Mills*,[1] "that both these principles apply to the present case. Indeed they are but variations of one and the same broad principle, that a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another—making a claim upon those whom he has deluded to their disadvantage, and founding that claim upon the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel' or by any other name, it is one which Courts of law have in modern times most usefully adopted."

Holding out an agent as having authority.

In *Cherry* v. *The Colonial Bank of Australasia*[2] two directors of a company sent to the company's bankers a letter containing a statement, false in fact and erroneous in law, to the effect that one *Clarke* had been legally appointed manager of the company, and was authorised to draw cheques. The Privy Council held that there was an implied warranty on the part of the directors, and that they were personally liable to the Bank to the extent of the sums drawn by *Clarke* subsequent to the date of their letter. In *Beattie* v. *Lord Ebury*[3], Lord Cairns in observing upon the above case said: "The Court proceeded upon the well-known principle of law, that if a false statement is made, false to the *knowledge* of the person making it, of a fact which is at the time practically ascertained one way or the other, and that statement is acted upon, and was meant to be acted upon by others, the persons who acted upon and were misled by that false statement, have a remedy against the person who made it."

Representation that money has been invested.

In *Middleton* v. *Pollock*,[4] one Pollock, a solicitor, was authorised by M, his client, to receive a sum of £7,700 in trust to invest it on a mortgage of leasehold property in Camden Town, and he received the money upon that footing on the 5th May 1871. On the 24th January 1872, he wrote to his client *that he had invested it*. Between these two dates Pollock had advanced moneys to a firm of builders on mortgage of leasehold property of theirs at Camden Town. Jessel, M. R., said: "If Pollock did in fact make the advance to Messrs. Mansbridge between those dates, the circumstance that the advance may have comprised other moneys

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[1] 7 H. & N., 913 (927) [1862].
[2] L. R., 3 P. C., 24 [1869].
[3] L. R., 7 E. & I. A., 111 [1874].
[4] L. R., 4 Ch. D., 49 [1876].

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besides the £7,700 which he represented to the petitioner had been invested, makes no difference. He was, in my opinion, bound, by his representation that the money was given him by the petitioner for the purpose of the particular investment. That being so it became impossible for him or persons claiming under him to say he did not make the advance."

Undertaking not to appeal.

So where a judgment-debtor induced a decree-holder to believe, and *expressly undertook*, that he would not prefer an appeal, and by such representation and undertaking procured his own release from arrest, it was held that he was estopped from acting contrary to his deliberate representation and undertaking, and his appeal was dismissed.[1]

Innocent misrepresentation.

The same principle applies even where a statement has been made ignorantly or innocently, provided the other party has been induced to alter his position. In *Horsfall* v. *Fauntleroy*,[2] the plaintiffs circulated a catalogue with certain conditions of sale, a copy of which was transmitted to the defendants, one of which was that payment was to be made on delivery by good bills on London. The defendant's agents bought ivory for them at the sale, and drew bills for the amount, which the defendants accepted in the belief that the agents had given good bills on London. It appeared that a verbal alteration had been made by the auctioneer at the sale on reading the conditions, and that four months' credit had been given to the defendant's agents as known buyers. The agents having stopped payment, the plaintiffs were held estopped by their catalogue from recovering the value of the ivory.[2] But where no change in position is caused by the statement no estoppel arises.[3]

And it would seem that under certain circumstances a municipal authority may, by issuing a notice in certain terms, be estopped from taking steps contrary to their declared intention.[4]

Conduct of culpable negligence.

II. Illustrations of what may or may not amount to conduct of culpable negligence are to be found in three recent mercantile cases.

Seton, Laing & Co. *v.* Lafone [1887].

The case of *Seton, Laing and Co.* v. *Lafone*[5] has already been referred to upon the question of the meaning of "proximate cause."

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[1] *Protap Chunder Dass* v. *Arathoon*, I. L. R., 8 Calc., 455 [1882].

[2] 10 B. & C., 755 [1830].

[3] See *Horsfall* v. *The Halifax and Huddersfield Union Banking Co.*, 52 L. J., Ch., 599 [1883], a case as to a banker's lien.

[4] See *Gould* v. *The Bacup Local Board*, 50 L. J. (M. C.), 44 [1881].

[5] L. R., 19 Q. B. D., 68 [1887].

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In that case a warrant had been issued by wharfingers in respect of certain goods stored by certain brokers with them, and, being negotiated, the warrant ultimately came into the possession of B and E, the plaintiffs' vendors. The wharf and business being taken over by the defendant, his servants by mistake delivered the goods to certain persons who were entitled to other goods instead of these goods, the defendants not being aware of the mistake. The warehouse rent in respect of the goods being in arrear, the defendant wrote to the plaintiff, who was carrying on the business of the brokers under their name, informing him, as the supposed holder of the warrant, and as the person who was to be presumed to be interested in the goods, that the goods were in hand and would be sold to cover the amount of rent due unless it was paid. In consequence of this, the plaintiff bought the warrant of B and E, and applied to the defendant for the goods, when it was discovered that they were no longer in his possession. The plaintiff sued to recover damages for the wrongful conversion of the goods. Denman, J., held that the defendant was liable. In the Court of Appeal, Lord Esher, M. R., in discussing the question whether the defendant's conduct came within the fourth proposition in *Carr* v. *London and North-Western Railway Co.*,[1] remarked as follows :—

The principle enunciated.

"The defendant makes a statement: it is a statement made in the course of business: it is a statement made by a wharfinger for the purposes of his business; the substance of it being that certain dye is in his warehouse under his charge as a warehouseman; that the warrants for it are outstanding, and therefore upon the production of them the dye will be delivered; and that the plaintiff is interested in the dye and the holder of the warrants and therefore bound to pay the rent, and if it is not paid the goods will be sold. The statement that the dye is in his warehouse being erroneous, the next question is whether it was negligently made. The goods were deposited in the warehouse long before the defendant became owner of it,—a fact he would ascertain from the books. There is nothing to shew that he took any pains to ascertain or made any enquiry whatever, whether, after that long interval, they were still in the warehouse.

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[1] L. R., 10 C. P., 307 [1875].

"It is alleged that there was no negligence, because there was no duty. I protest that, if a man in the course of business volunteers to make a statement on which it is probable that in the course of business another will act, there is a duty which arises towards the person to whom he makes that statement. There is clearly a duty not to state a thing which is false to his knowledge, and, further than that, I think there is a duty to take reasonable care that the statement shall be correct. Statement in the course of business.

"It is not stated to be necessary by the terms of the proposition to which I have referred, and I do not think it is necessary that the person making the statement should have *intended* the person to whom he made the statement to act in any particular way upon it. . . Then the statement being negligently made the next question is whether the plaintiff believed it, and it seems to me that the obvious inference from the facts is that he did so. Then the next question is, whether the statement was calculated to make him believe in a certain state of facts, and in consequence to do what he did upon the strength of that belief, or to put, what seems to me to be the same question, in other words, whether it was reasonable as a matter of business for the plaintiff to do what he did as a result of his belief in the defendant's statement. It seems to me that the natural result of the defendant's statement is the conclusion in the plaintiffs' mind that if he buys the warrant he can get the goods, and that he would buy the goods if he thought he could get a good bargain by so doing." Doctrine of changed situations.

The case of *Coventry* v. *The Great Eastern Railway Co.*[1] illustrates the same doctrine. On the 12th December one Bowden came to the plaintiffs with a delivery order signed by B. S. & Co., addressed to the defendants directing them to deliver to him 150 sacks of wheat from Seagrave contained in certain trucks with numbers "as per orders lodged." On the 13th December the plaintiffs made advances to Bowden upon the delivery order, which was lodged with, and accepted by, the defendants. On the 14th December Bowden came to the plaintiffs with *another delivery order*, made out on one of the defendants' forms and printed at the foot of the *advice note*, dated the 13th December, which was addressed to Bowden, and stated that the undermentioned grain (151 sacks of Coventry v. The Great Eastern Railway Co. [1883].

[1] L. R., 11 Q. B. D., 776 [1883].

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wheat from Seagrave) consigned to him had arrived and was held subject to his order. Bowden, having filled up the second delivery order with the plaintiffs' name, received *further advances* from them, and the order was lodged with the defendants and was accepted by them. Bowden having become insolvent, the plaintiffs tried to sell the wheat, when they discovered that there was only *one* parcel. The defendants stated at the trial that a preliminary advice note marked "account to follow" was sent to Bowden as consignee of the wheat from Seagrave; that advice note was transferred by him to B. S. & Co., and the defendants agreed to hold to their order. This document never came to the plaintiffs' knowledge. On the 12th December, B. S. & Co. instructed the defendants to deliver the goods to Bowden. Upon the document of the 13th December the words "charges only" were written at the top and across it, and it was intended by the defendants to be merely an account of the charges: and at the foot of this document were the following words—"notice; please sign the undermentioned order, without which the goods cannot be delivered by the Great Eastern Railway Co. Please deliver the abovementioned goods to Coventry, Sheppard and Co., or bearer. Bowden and Co." It was indorsed "Coventry, Sheppard and Co.," Pollock, B., held that the advice note amounted to an admission by the defendants that they held the grain at the disposal of the consignees, and that the plaintiffs were entitled to say that the documents must be taken as representing goods actually in the defendants' possession.

Negligently issuing documents having a mercantile meaning.

Upon appeal the judgment was affirmed. Brett, M. R., said: "The question is as to the second document. It is an undertaking. The question is whether any of the facts of this case are brought within any of the recognised doctrines of estoppel. In *Carr* v. *London and North-Western Railway Co.*[1] certain propositions were laid down as to this: one of them, as to negligence, will govern this case. Now, were the defendants guilty of culpable negligence? Might the plaintiffs reasonably suppose that the document, upon which the defendants themselves had acted, had been correctly drawn up? It is true that there can be no negligence, unless there be a duty: but here the documents have *a certain*

[1] L. R., 10 C. P., 307 [1875].

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mercantile meaning attached to them, and therefore the defendants owed a duty to merchants and persons likely to deal with the documents."

"Then was the negligence of the defendants the 'proximate' cause of the loss sustained by the plaintiffs? I use the expression 'proximate cause' as meaning the 'direct and immediate cause.' Here the production of the document was the 'direct and immediate' cause of the advance of money to Bowden and Co. by the plaintiffs. And, certainly, the negligence of the defendants was to the prejudice of the plaintiffs and allowed the fraud to be perpetrated upon them. It seems to me, therefore, that the defendants are estopped as against the plaintiffs, their negligence having been the immediate cause of the advance . . . . The acceptance of the document is fatal to the defendants as shewing that they elected to treat it as a delivery order; and it is the strongest piece of evidenee that they so acted as to entitle persons to believe that they would deliver the wheat when the proper document should be presented to them. The documents issued by the company are not negotiable instruments, and do not pass the property; but the defendants are estopped from denying the plaintiffs' right to the sacks of grain claimed by them."

Negligence must be proximate cause.

And Lindley, L. J., added: "The plaintiffs did advance money on the faith of the document presented to them; it contained a statement as to the arrival of the goods, and a form of order. It may be said that the document was only an intimation to men of business, and not a representation to be acted upon; but the plaintiffs did not so understand it. It may be said that it is not proved that the documents were treated as delivery orders; but we must look at the facts, and it will be seen from them that the plaintiffs acted upon the documents presented to them. The form of the documents distinguishes this case from *Carr* v. *London and North-Western Railway Co.*" [1]

Inference from conduct.

Carr *v.* The London and North-Western Ry. Co. [1875].

In *Carr* v. *The London and North-Western Railway Co.*, the conduct of the defendants was held not to amount to negligence. The action was for non-delivery (with a count in trover) of fifteen casks of bleaching powder marked B, Nos. 16 to 30, which were alleged to have been delivered to the defendants for consignment

[1] L. R., 10 C. P., 307 [1875].

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to the plaintiff. It appeared at the trial that the defendants had informed the plaintiff that they had received the goods for his account, and had been paid by him the warehouse rent and charges on them; and the plaintiff, believing that the whole of the goods were in the defendants' warehouse at his disposal, entered into a contract for the sale of the goods which he had been unable to perform, and had been obliged to buy other goods in order to carry out his contract with his vendees. For the plaintiff, it was argued that, the defendants were estopped from saying that they had not received the goods, the plaintiff having been induced to enter into a contract upon the faith of their negligent representations. For the defendants, it was submitted that, inasmuch as the casks, B Nos. 16 to 30, had never reached their hands, they could not be liable in trover for them, and that there were no damages which could be said to be the natural or reasonable result of any breach of contract.

It appeared that, on the 9th of July, by a mistake of the defendants' clerk, the plaintiff had been notified of the arrival of casks, B Nos. 16 to 30, which, however, were still on the vendor's premises, and the charges thereon were accordingly paid by the plaintiff. The mistake being afterwards discovered and made known to all parties, the plaintiff's purchasers bought in fifteen casks against him at a loss to him of £5-4-1.

The jury found for the plaintiff for the full value of the casks with interest and £5-4-1, the amount of loss which the plaintiff had sustained on the purchase of other goods by his vendees. And in answer to a question put to them, they found "that the defendants knew of the mistake on the 9th July, and that there was no sufficient intimation by the defendants to the plaintiff of the mistake." A verdict was entered for the defendant with leave to the plaintiff to move to enter a verdict in his own favour.

The Court of Common Pleas discharged the rule. In the course of his judgment, Brett, J., laid down the four propositions as to estoppels which have been noticed above, holding that the plaintiff had failed to bring the case within either of these propositions

Conduct of indifference or acquiescence.

III. It is, however, with reference to the third class of cases that the greatest difficulty has arisen, especially where statements have been made, expressly or by implication, which cannot properly be

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characterised as representations at all. It must now be regarded as settled that an estoppel may arise as against persons who have not wilfully made any misrepresentation, and whose conduct is free from fraud or negligence, but as against whom inferences may reasonably have been drawn upon which others may have been induced to act.

Inference from conduct.

In connection with this part of the subject, the doctrine of Acquiescence requires to be explained. "If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act."[1] This is the proper sense of the term acquiescence, "and in that sense may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it, *and is no more than an instance of the law of estoppel by words or conduct*."[2]

Acquiescence.

Standing by or concealment of title.

The common case of acquiescence is where a man, who has a charge or incumbrance upon certain property, stands by and allows another to advance money on it or to expend money upon it. Equity considers it to be the duty of such a person to be active and to state his adverse title, and that it would be dishonest in him to remain wilfully passive in order to profit by the mistake which he might have prevented.[3]

Mortgagee or prior encumbrancer.

So a mortgagee or prior encumbrancer bringing the property to sale in execution of a money-decree without giving the purchaser notice of his encumbrance will be estopped from subsequently enforcing the lien of which he has given no notice. He has, by his conduct, led the purchaser to believe that the property was offered for sale free of encumbrances and to pay full value for it, and cannot, as against the latter, be heard to deny that the sale took

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[1] *Duke of Leeds* v. *Earl of Amherst*, 2 Ph., 117 (123) [1846]; *De Bussche* v. *Alt*, L. R., 8 Ch. D., 286 (314) [1878]. See *Bisheshar* v. *Muirhead*, I. L. R., 14 All., 262 (364) [1892].

[2] *De Bussche* v. *Alt*., L. R., 8 Ch. D., 286 (314). As to acquiescence not sufficient to bar legal rights where no question of limitation arises, see *Rambhat* v. *Bababhat*, I. L. R., 18 Bom., 250 [1893].

[3] *Ramsden* v. *Dyson*, L. R., 1 E. & I., Ap., 129 (140) [1865]; *Ex-parte Ford*, L. R., 1 Ch. D., 521 (528) [1876]. See the Chapter on Benami Transactions and Family Arrangements, Part I, Chapter II.

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Creditor.

place free of encumbrances.[1] And it would seem, generally, that where a creditor suppresses the fact of his debt and induces another person to enter into a contract, he will not be permitted to set up the debt, even against the person in whose favour and at whose instance he made the suppression.[2] The circumstance of looking on is in many instances as strong as using terms of encouragement.[3]

Knowledge of legal rights not the true criterion.

In such cases the conduct must be such that assent may reasonably be inferred from it. The doctrine of acquiescence has, however, been stated to be founded upon conduct with a *knowledge* of legal rights, and as stated in some recent cases appears to imply the existence of *fraud* on the part of the person whose conduct raises an estoppel.[4] The remarks of the Judicial Committee, however, in *Gopal Chunder Dey* v. *Sarat Chunder Laha*,[5] clearly

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[1] *Dullab Sirkar* v. *Krishna Kumar Bakshi*, 3 B. L. R. (A. C.), 407; 12 W. R., 303 [1869]; *Doolee Chund* v. *Oomda Begum*, 24 W. R., 263 [1875]; *Tukaram* v. *Ramchandra*, I. L. R., 1 Bom., 314 [1876]; *Tinnappa* v. *Murugappa*, I. L. R., 7 Mad., 107 [1883]; *Nursing Narain Singh* v. *Roghoobur Singh*, I. L. R., 10 Calc., 609 [1884]; *Agarchand Gumanchand* v. *Rakhma Hanmant*, I. L. R., 12 Bom., 678 [1888]; *Jaganatha* v. *Ganga Reddi*, I. L. R., 15 Mad., 303 [1892]; *Kasturi* v. *Venkatachalapathi*, I. L. R., 15 Mad., 412 [1892]; and see Act XIV of 1882, s. 287 (*c*), (corresponding with s. 213 of Act VIII of 1859); *Banwari Das* v. *Muhammad Mashiat*, I. L. R., 9 All., 690 [1887], distinguished in the last Madras case. See also *Solano* v. *Lalla Ram Loll*, 7 C. L. R., 481 [1880]; *Gheran* v. *Kunj Behari*, I. L. R., 9 All., 413 [1887], and cases there cited and distinguished. As to the estoppel against a mortgagee, see Act IV of 1882, § 78.

[2] See *Neville* v. *Wilkinson*, 1 Bro. C. C., 543 [1782]; *Dalbiac* v. *Dalbiac*, 16 Ves., 125 [1809].

[3] *Per* Lord Eldon in *Dann* v. *Spurrier*, 7 Ves., 236 [1802].

[4] See *Wilmott* v. *Barber* [L. R., 15 Ch. D., 96, 105 (1880)]: "A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What then are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, *and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights*. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly, or by abstaining from asserting his legal rights." The remarks of Fry, L. J., were followed by the same learned Judge in *Russell* v. *Watts*, L. R., 25 Ch. D., 559 (585) [1883], and were accepted in this country in *Baswantapa* v. *Ranu*, I. L. R., 9 Bom., 86 [1884]. Fry, J., in the earlier case observed: "It has been said that the acquiescence which will deprive a man of his legal rights *must amount to fraud*, and in my view that is an abbreviated statement of a very true proposition."

[5] L. R., 19 I. A., 203; I. L. R., 20 Calc. 296 [1892].

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extend the doctrine of estoppel by conduct of acquiescence or indifference to cases where no fraud whatever can be imputed to the person estopped, and where that person may have acted *bonâ fide* without being fully aware, either of his legal rights, or of the probable consequences of his conduct. In every case, as already pointed out, the determining element is, not the motive or the state of knowledge of the party estopped, but the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.

Sometimes a relation of trust is created.

Estoppels have now to be considered in detail with reference to the transactions out of which they arise. With regard to the large class of estoppels in this country where the matter can be put no higher than upon inferences drawn from conduct, it may be useful to observe that in many instances a relation of trust is created between the parties. Such, at all events, appears to be the most satisfactory basis upon which to rest most of the cases to be examined in the next chapter.

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CHAPTER II.

Benami Transactions and Family Arrangements.

Acquiescence or standing by; concealment of title—Benami Transactions—General rule, the truth may be shewn—Exception where position of third parties affected—Estoppel available to assist purchasers, mortgagees, or creditors—Principle of estoppel by conduct—Third parties dealing with benamidar are affected with notice of the real title—What notice will be sufficient—The contest is between the true owner and one who has dealt with the benamidar—The heir of the creator of the benami is affected with the same estoppel—*Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* [1873]—The heir may be estopped by his own acts, although the acts of the creator of the *benami* do not raise an estoppel—*Sarat Chunder Dey's case* [1892]—Extension of the rule of estoppel by conduct—Purchaser at execution-sale not estopped as he does not claim through the judgment-debtor—Unless the estoppel is already in operation—Arrangements made in fraud of creditors—Effect of, as between the colluding parties—Earlier Calcutta decisions—*Ram Sarun Singh* v. *Musst. Pran Peavee* [1864]—Calcutta decisions—Bombay; suggested distinction where fraud has not gone beyond intention—Transaction void as against third party—Estoppel in cases of family arrangements—Principle upon which enforced—Cases of Partition—Cases of Adoption—Recognition of person as member of a Hindu family—Conduct will always be evidence—Relation of Trust.

Acquiescence; or standing by concealment of title.

One of the common cases of estoppel by acquiescence[1] has already been referred to, where the owner or mortgagee of property stands by and allows another to expend money upon it. If a person having a right to an estate permit or encourage another person to buy it, or to advance money upon it, the purchaser or mortgagee shall in equity at least hold it against the person who has the right.[2] The real owner having countenanced the acts of which he complains is not entitled to any consideration. So, if a mortgagee conceals his lien and allows the security to be sold, he cannot afterwards establish his right, upon the plain equity that a man, who has

Mortgagee.

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[1] See Part I, Chapter I, p. 57, and cases there cited.

[2] *Bhyro Dutt* v. *Musst. Lekhranee Kooer*, 16 W. R., 123 (5) [1871], citing Taylor on Evidence, Vol. I, § 845, 8th ed., p. 724; *Moonshee Syud Ameer Ali* v. *Syef Ali*, 5 W. R., 289 [1866]; *Baboo Radhakissen* v. *Mussamut Shureefunnissa*, W. R., 1864, 11, citing Story's Equity Jurisprudence, § 385; *Monmohinee Joginee* v. *Jugobundhoo Sadhooka*, 19 W. R., 233 [1873]; *Baneepershad* v. *Baboo Maun Singh*, 8 W. R., 67 [1867]. See also *Baswantapa Shidapa* v. *Ranu*, I. L. R., 9 Bom., 86 [1884]; and *Rajcumar* v. *McQueen*, 11 B. L. R., 46 (P. C.) [1872], where the rule is broadly stated.

represented to an intending purchaser that he has no security, and induced him under that belief to buy, cannot as against him attempt to put his security into force.[1] The general principle is well illustrated in the case of *Mohesh Chunder Chatterjee* v. *Issur Chunder Chatterjee*[2] cited in a subsequent chapter.[3]

An important class of cases illustrating the doctrine of estoppel by acquiescence requires examination, namely, cases of BENAMI TRANSACTIONS and FAMILY ARRANGEMENTS.

Benami transactions.

A Benami transaction has been described shortly as one in which the real owner of property allows it to appear in the name of an ostensible owner under a sort of secret trust. The system has been recognised in India for a very long time. It has been resorted to, sometimes for the sake of convenience in order to provide for the efficient management of property, sometimes to avoid liability attaching to it. In order to establish whether a transaction is benami or not, it is necessary to trace the source from which the purchase-money was derived in order to see whether the ostensible owner is in truth the real owner. The actual possession or receipt of the rents of the property is also most important.[4]

General rule, the truth may be shewn.

The rule then is to give effect to the real nature of the transaction. Thus the real owner may, as against the benamidar, establish the trust existing in his own favour, or may plead it in answer to a claim set up by the benamidar or against creditors of the benamidar. And creditors of the real owner may proceed against his property in the hands of a benamidar.[5]

Exception where the position of third parties is affected.

In a case decided in the year 1863 the Calcutta Court observed: "While it is impossible to ignore the existence of benami

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[1] See Act IV of 1882, s. 78; *Munnoo Lall* v. *Lalla Choovee Lall*, 21 W. R., 21 [1873, P. C.]; *Dullab Sirkar* v. *Krishna Kumar Bakshi*, 3 B. L. R. (A. C.), 407 [1869]; *McConnell* v. *Mayer*, 2 N. W. P. H. C. R., 315 [1870]; *Gheran* v. *Kunj Behari*, I. L. R., 9 All., 413 [1887]. See *Chintaman Ram Chandra* v. *Dareppa*, I. L. R., 14 Bom., 506 [1890]; where mortgagees living at a distance from the land and knowing nothing of a sale by the mortgagor, were held not estopped. In that case it was held that, in any event the registration of the mortgage would have been notice to the purchaser of their title. But see *Agarchand Guman Chand* v. *Rakhma Hanmant*, I. L. R., 12 Bom., 678 [1888], and the definition of 'notice' in Act IV of 1882, § 3 (*c*); and see *Kasturi* v. *Venkatachalapathi*, I. L. R., 15 Mad., 413 [1892]; *Jaganatha* v. *Gangi Reddi*, I. L. R., 15 Mad., 304 [1892].

[2] 1 Ind. Jur. N. S., 266 [1866].

[3] Part I, Chapter VI.

[4] *Imambandi Begum* v. *Kumleswari Pershad*, L. R., 13 I. A., 160 [1886]. See also as to representations *Musst. Thakro* v. *Ganga Pershad*, L. R., 15 I. A., 29 [1887].

[5] Mayne, Hindu Law and Usage, §§ 400—402.

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transactions in Bengal, we have no doubt that they must be judged by the ordinary and well-established rules of law, and that a third party cannot be made to suffer by the voluntary acts of owners of property. It is not to be supposed that, because the existence of benami transactions has been recognised by our Courts, parties are at liberty to use the system to the injury of others, whether by direct fraud, or by putting other parties in a position to defraud, or take undue advantage of innocent persons."[1]

Estoppel available to assist purchasers, mortgagees or creditors.

The principles of estoppel operate to modify the general rule that the real nature of the transaction may be shewn, in favour of innocent third parties, whether purchasers, mortgagees, or creditors, whose acts have been influenced by the conduct of the real owner in permitting the ostensible owner to appear as such to the rest of the world.[2] The estoppel extends to the heirs of, and those claiming under, the real proprietor.

Principle of estoppel by conduct.

If, therefore, a person takes a conveyance of an estate in the name of another, and while constituting such person the legal owner, also allows him to appear to all the world as the sole equitable owner, he cannot turn round upon one who has honestly dealt with such person on the faith of his apparent ownership, whether as a purchaser or a mortgagee, and set up the secret trust in his own favour against a title acquired honestly and without notice from the person who holds benami for him; ase against such a person he is estopped from alleging that his own title is different from what he has caused it to appear to be.[3]

Third parties dealing with benamidar are affected with notice of the real title.

The rule was recognised at an early date,[4] and has been acted upon in numerous cases, but is subject to the limitation that the

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[1] *Rackhaldoss Moduck* v. *Bindoo Bushinee Debea*, 1 Marsh., 293 (295).

[2] Section 41 of the Transfer of Property Act (IV of 1882) provides that, "where with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith." See the recent case of *Bisheshar* v. *Muirhead*, I. L. R., 14 All., 362 [1892], where the principle is clearly stated. Also *Thakuri* v. *Kundan*, I. L. R., 17 All., 280 [1895].

[3] *Kally Doss Mitter* v. *Gobind Chunder Paul*, 1 Marsh., 569 (571) [1863]; *Nundelall* v. *William Tayler*, 1 Ind. Jur. (N. S.) 55 [1866]; *Rennie* v. *Gunganarain Chowdhry*, 3 W. R., 10 [1865].

[4] See *Bhugwan Doss* v. *Upooch Singh*, 10 W. R., 85 [1868]; *Rennie* v. *Gunga Narain Chowdhry*, 3 W. R., 10 [1865]; *Nundun Lal* v. *Tayler*, 5 W. R., 36 [1866]; *Brojonath Ghose* v. *Koylash Chunder Banerjee*, 9 W.R., 593 [1868]; *Obhoy Churn Mookerjee* v. *Punchanun Bose*, Marsh., 564 [1863];

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purchaser, mortgagee or creditor may be fixed with notice, actual or constructive, of the real title.

The Privy Council, in *Ramcoomar Koondoo* v. *McQueen*,[1] say that the principle of decision in these cases is the same as that in the case of resulting trusts, and that it rests upon the general rules of justice, equity, and good conscience, the principle being one of natural equity ; and their Lordships point out that the title of a purchaser may be overthrown by shewing, either that he had direct notice, or something amounting to constructive notice of the real title ; or that circumstances exist which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it. "These circumstances must be of such a specific character that the Court can lay its finger upon them. It is not enough to assert generally that enquiries should be made, or that a prudent man would make enquiries ; some specific circumstance should be pointed out as the starting point of an enquiry which might be expected to lead to some result."

What notice will be sufficient.

The estoppel in these cases is founded upon the presumption that the real owner is a party to the transaction between his benamidar and the third party, and rests upon the fact that the latter was induced to believe the property to be the benamidar's and to act upon that belief to his disadvantage. It is not necessary that the creditor should prove specific conspiracy or fraud as against the real owner, as that would be impossible in most cases. All that is necessary for the creditor to shew is that the real owner has lent himself to the benamidar's fraud. "It would be monstrous if it were allowed that a man should invest another with the apparent ownership of his property ; and then, after that other has raised money upon the property, resume it in virtue of a private understanding."[2]

Conduct on the part of the real owner creates the estoppel.

It would seem, then, that a mortgagee or purchaser from a benamidar must rely on the title of the true owner and not on that of the benamidar, and must shew that the former was, in the above sense, a party to the transaction. In such cases, as observed

The contest is between the true owner and one who has dealt with his benamidar.

Smith v. *Moldum Mahtoon*, 18 W. R., 526 [1872] ; *Ram Mohinee Dossee* v. *Pran Koomaree*, 3 W. R., 87 [1865] ; *Nidhee Singh* v. *Bisso Nath Dass*, 24 W. R., 79 [1875], and numerous other cases.

[1] 11 B. L R., (P.C.), 46 (54) [1872]. *See* 'notice' defined in Act IV of 1882, § 3 (*c*).

[2] *Rackhaldoss Moduck* v. *Bindoo Bashinee Debea*, Marsh., 293 (294) [1863].

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in *Bashi Chunder Sen Poddar* v. *Munshi Enayet Ali*,[1] the contest is between the true owner of the property and a purchaser from his benamidar. In the case now cited, the son of the true owner mortgaged the property to the plaintiff, and the defendant purchased the same property in execution of a decree against the owner. The Court held that there could be no estoppel against the defendant who held adversely to the owner, and thought that the onus would lie upon the defendant only in a case in which the owner or his representative as defendant is contesting an alienation by the benamidar.

The heir of the creator of the benami is affected by the same estoppel.

The heir of a person who creates a benami may be bound, as between himself and a purchaser from the benamidar, by his ancestor's act, irrespective of any act or omission of his own, and even although he was a minor at the time of the purchase, there being a continuing misrepresentation by the ancestor by which the heir is bound.

Luchmun Chunder Geer Gossain v. Kally Churn Singh [1873.]

In the case of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh*[2] there had been a long course of public acts and declarations by Ubotar Singh, the grantor of a deed of sale to his wife Ulpa, and he, during his lifetime, as far as possible, by transfer of possession and otherwise, did all that he could to cause his wife to bear towards the public the character of owner. "The heirs," said their Lordships of the Privy Council, "were as much bound by the misrepresentations made by the father, as the father would have been if the wife in his lifetime had actually sold the property to a *bonâ fide* purchaser. In such a case the father could not have recovered the property from the purchaser; and it appears to their Lordships that the minor, claiming by descent from the father, is equally bound by those misrepresentations, and that he cannot, as heir to the father, set up that that property belonged to the father, when the father could not, in his own lifetime, under similar circumstances, have set up that the property belonged to him."[3]

The above case was referred to in two recent decisions of the Calcutta High Court. In *Chunder Coomar* v. *Hurbuns Sahai*[4] the plaintiff sued as the son and heir of one L B, alleging that

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[1] I. L. R., 20 Calc., 236 [1892], observing upon the dictum of Phear, J., in *Bhugwan Doss* v. *Upooch Singh*, 10 W. R., 185 [1868].

[2] 19 W. R., 292 [1873].

[3] *Ib.*, 297.

[4] I. L. R., 16 Calc., 137 [1888].

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L B in his lifetime purchased certain property from J D in the name of his wife R; that, during plaintiff's minority, J D's nephew, the defendant, brought an unfounded suit of pre-emption against R, and by compromise with her obtained a decree and took possession of the property. The plaintiff claimed the property as the heir and representative of his father on the ground that R was a mere benamidar. The Court held, on the authority of the Privy Council case, that the defendant, as a purchaser for valuable consideration from R, had a complete defence as against the heir.

The heir may be estopped by his own acts, although the acts of the creator of the benami do not raise an estoppel.

In the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*[1] the opinion was expressed by a Division Bench of the Calcutta High Court that the mere fact that a transfer of property is benami, does not constitute such a misrepresentation as to bind all persons claiming under the creator of the benami. The Court were of opinion that the Privy Council case did not go so far as to lay down that principle, however salutary it might be that such should be the rule of law, and held that the acts of the creator of the benami were not such as to constitute an estoppel against his heirs.

Sarat Chunder Dey *v.* Gopal Chunder Laha [1892].

The case was reversed by the Privy Council upon another ground, and in the course of their remarks their Lordships of the Judicial Committee enunciate certain principles of much importance as regards the general rule of estoppel by conduct and its application to benami transactions.[2]

In the case now cited one Umed Ali Ostagur in 1878 made a benami gift of his property to his wife, Arju Bibee, by *hiba*, registered and purporting to be made in consideration of the dower due to her, and, without mutation of names, managed the property as her ammuktar under a general power-of-attorney. In 1880 Arju Bibee, a few months after her husband's death, mortgaged the property to one Kalimuddin, who obtained a decree in execution of which the appellant's predecessors purchased and came into possession. In 1885, however, Gopal Chunder, the plaintiff, purchased from Ahmed Hossein and Rahimunnessa Bibee, a son and a daughter of Umed Ali, the shares to which they claimed to have succeeded on the death of their father. The plaintiff sued for declaration of his right to these shares and for partition. The *hiba* of 1878 having been found to be invalid, the question remained for

[1] I. L. R., 16 Calc., 148 [1888].

[2] See this case cited at length, *supra*, pp. 43—48.

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decision whether Ahmed Hossein and Rahimunnessa were estopped by their father's acts or by their own conduct from asserting their rights of succession.

The Judicial Committee, distinguishing *Luchmun Chunder Geer Gossain* v. *Kally Churn*,[1] held that there was no foundation for the plea of estoppel so far as founded on the actings of Umed Ali, the *hiba* of 1878 being in no way different from an ordinary benami transaction; but, upon the question whether the plaintiff was estopped from maintaining the invalidity of the *hiba* by the declaration or acts of his authors in title, their Lordships were of opinion that he was so estopped in consequence of the conduct of Ahmed, who was of age to consent to the mortgage of 1880, and by his acts and representations to bar himself from challenging it.

Extension of the rule of estoppel by conduct.

Applying the principles of estoppel by conduct, their Lordships found that Ahmed represented his mother in the transaction of the mortgage; that he acted as her ammuktar, signed the mortgage on her behalf and in her name, and received the consideration-money; and that the terms of Section 115 of the Evidence Act directly applied to the case, "for Ahmed, having by his acts and the declaration which his acts involved, intentionally caused the lender to believe that Arju Bibee as proprietor under the *hiba* was entitled to grant the mortgage, neither he nor his representative, the plaintiff, could be allowed to deny the truth of what was thereby represented, believed, and acted on."

As pointed out in the Chapter on Representations, the effect of this decision appears to be an extension of the rule of estoppel by conduct which will affect every branch of the law to which the doctrine has been applied. Even assuming that Ahmed acted in *bonâ fide* ignorance of his own rights as heir, their Lordships held that the position of the person who was induced to act must be looked to; the determining element being "not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it."

There is, however, no estoppel against the purchaser at a sale held in execution of a decree obtained against a person who would by his conduct be precluded from denying the title of third parties

[1] 19 W. R., 292 (P. C.) [1873].

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who have dealt with his benamidar. In *Dinendronath Sannial* v. *Ramkumar Ghose*,[1] the Judicial Committee observed: "There is a great distinction between a private sale in satisfaction of a decree, and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone; in the latter, the sale must be made by public auction conducted by a public officer, of which notice must be given as directed by the Act, and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title, and interest of the judgment-debtor, acquires that title by operation of law, adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution."

Purchaser at execution-sale not estopped as he does not claim through the judgment-debtor.

So in *Lala Parbhu Lal* v. *Mylne*,[2] it was held that a purchaser at an execution-sale is not the representative of the judgment-debtor so as to be estopped by the conduct of the latter from denying the validity of an adoption. "Estoppel," said the Court, "is purely a personal bar operating against the person whose conduct constitutes it, and against his privies and representatives. That it will not operate as against a simple money-creditor as such is established by the case of *Richards* v. *Johnston*.[3] The case of a mortgagee would seem to be different, for he derives his title directly from the debtor, and will be bound by the previous conduct of the debtor in respect of the property mortgaged. The case of *Poresh Nath Mookerjee* v. *Anath Nath Deb*[4] shews that if the execution-purchaser had been also mortgagee of the property from R, he might be held to be his representative under Section 115; but we are aware of no authority for holding that the simple fact of purchase at an execution-sale will make him the representative, for the purpose of that section, of the judgment-debtor."

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[1] I. L. R., 7 Calc., 107; L. R., 8 I. A., 65 [1881]. See *Musst. Imrit Kooer* v. *Lalla Debee Pershad Singh*, 18 W. R., 200 [1872]; *Srimati Anand Mayi Dasi* v. *Dhurandra Chandra Mookerjee*, 8 B. L. R., 122 (127) [1871].

[2] I. L. R., 14 Calc., 401 [1887].

[3] 4 H. & N., 660 [1859], where Martin, B., citing *Heane* v. *Rogers* [9 B. & C., 586]: 'It is a well-established rule that estoppels bind parties and privies and not strangers,' observed: "But no authority has been cited to shew that a judgment-creditor is party or privy to the acts of the judgment-debtor."

[4] I. L. R., 9 Calc., 265; L. R., 9 I. A., 147 [1882].

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Unless the estoppel is already in operation.

It is, however, clear that a mortgagee, who would be estopped by the representations of his mortgagor, does not improve his position by purchasing the mortgaged property at a sale held in execution of a decree obtained by him on his mortgage.

In a suit for rent brought by the putnidar against the durputnidar, the latter pleaded that he had parted with his interest to his wife and son, and the suit was dismissed. The putnidar then sued the wife and son, and purchased their durputni interest at the execution-sale. In a suit by the putnidar, suing as durputnidar, against a tenant, one P intervened and claimed title to the durputni under a mortgage from the previous durputnidar made after the dismissal of the first suit, and alleged that the wife and son were only benamidars, and that he had completed his title by purchase in execution of a decree obtained on his mortgage. The Privy Council held (adopting the view of the Calcutta High Court) that P, the intervening mortgagee, was bound by the estoppel arising out of his mortgagor's disclaimer of title in the previous suit; that his mortgagor had directly induced the plaintiff to believe that he had sold his property absolutely to his wife and son, and led him to bring a suit against them for rent and to purchase their interest, and that P was in no better position than his mortgagor by reason of his purchase at the execution-sale.[1]

"Our opinion," said Garth, C. J., in the lower Court, "in this respect is founded upon the well-known rule of law laid down by Lord Denman in the well-known case of *Pickard Sears*.[2] This rule, the justice of which is very obvious, is embodied in the 115th Section of the Evidence Act. It would be perfectly monstrous in this case to allow Issur Chunder or any one claiming under him to contend that the plaintiff has no right to the estate which he has purchased upon the faith of representations made by Issur Chunder himself."[3]

In the recent case of *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein*,[4] the principle of the case last cited was applied to execution-purchasers under the following circumstances. The plaintiffs attached property in execution of a decree held by them against the estate of one A, whose widow claimed the property by right of

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[1] *Poresh Nath Mookerjee* v. *Anath Nath Deb*, I. L. R., 9 Calc., 265; L. R., 9 I. A., 147 [1882].

[2] 6 A. & E., 40 [1837].

[3] Sub. nom. *Anath Nath Deb* v. *Bishtu Chunder Roy*, I. L. R., 4 Calc., 783 (787).

[4] I. L. R., 18 Calc., 188 [1890].

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purchase from her husband in lieu of dower ; and upon her objection the property was released. Pending an appeal the widow mortgaged part of the property to the defendants. Upon appeal the case was remanded, and was settled by a compromise between the plaintiffs and A's widow, by which a 12 annas share of the property was released from attachment and a 4 annas share including the property in suit was declared liable under the decree. The plaintiffs purchased the property in suit at the execution-sale, and sued the defendants upon the strength of this title. The defendants, who had purchased the property in execution of their mortgage-decree, contended upon appeal that they had a good title as *bonâ fide* mortgagees and auction-purchasers as against A and all persons claiming under him, A having allowed his widow to appear as the ostensible owner of the property. The Court held, upon the authority of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh*,[1] that this question was sufficiently raised by the pleadings, and that, though the plaintiffs were not mortgagees from A or his heirs, yet as their right to hold the property in dispute resulted from a compromise between them and the widow, their position was more analogous to that of the auction-purchaser in the case of *Poresh Nath Mookerjee* v. *Anath Nath Deb*[2] than to the position of the execution-purchaser in *Lala Parbhu Lal* v. *Mylne*.[3] The plaintiffs were, therefore, upon the authority of the former case estopped from questioning the defendant's title, having allowed the widow to appear as the ostensible owner in the matter of the compromise, and having stated in the sale-proclamation, pursuant to which they made their purchase, that the property was mortgaged to the defendants. This notification enabled them to purchase for an inadequate sum,[4] and they could not be heard to say that the mortgage was not binding on them. This decision has been upheld by their Lordships of the Judicial Committee[5] citing and applying the observations of Sir Montague Smith in *Ramcoomar Koondoo* v. *McQueen*.[6]

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[1] 19 W. R., 292 [1873].

[2] I. L. R., 9 Calc., 265; L. R., 9 I. A., 147 [1882].

[3] I. L. R., 14 Calc., 401 [1887].

[4] See *Bijonath Sahoy* v. *Doolhun Biswanath Kooer*, 24 W. R., 83 [1875].

[5] L. R., 22 I. A., 129 [1895]. Sub. nom. *Mir Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy*.

[6] 11 B. L. R. (P. C.) at p. 54 [1872], *supra*, p. 63.

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Arrangements made in fraud of creditors.

Another class of cases, which arise chiefly in connection with documents and decrees, requires to be considered, where two parties combine to make a false statement in order to deceive a third party, and one of those parties afterwards avows the fraud, and seeks to dispossess his companion upon proof of the real nature of the transaction. The question in such cases is whether a party alleging that the transaction was a benami and fictitious one, made with the direct object of defrauding creditors, can be allowed to take advantage of his own fraud. The earlier decided cases go to shew that a party cannot allege or plead his own fraud, and his representatives are in the same position, and this view has recently been re-affirmed in Bombay. The contrary rule, however, is supported by considerable authority, and the question can scarcely be regarded as settled. In a recent case cited below,[1] a solution of the difficulty is suggested.

Effect of, as between the colluding parties.

Earlier Calcutta decisions.

Kaleenath Kur v. *Doyal Kristo Deb*[2] illustrates the earlier cases.[3] The plaintiff sued to recover possession of certain land which had been made the subject of a benami conveyance by his father in favour of the defendant's father and others, the conveyance being in fraud of creditors. The High Court, upon a review of the rulings from the year 1859, and upon consideration of a passage in Taylor on Evidence,[4] differed from the view taken in that authority, and held that the plaintiff could not be permitted to plead the fraud of his father from whom he derived his title. The principle of this and other similar decisions may be expressed in the words of Hobhouse, J.: "I think it is far too common in this country for persons, when they become embarrassed and are in danger of losing their property by being compelled to satisfy just debts out of it, to transfer the property for the sake, as they

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[1] *Babaji* v. *Krishna*, I. L. R., 18 Bom., 372 (374) [1893].

[2] 13 W. R., 87 [1870].

[3] See *Hurry Sunker Mookerjee* v. *Kali Coomar Mookerjee*, Gap vol. W. R., 265 [1864]; *Aloksoondry Goopta* v. *Horo Lal Roy*, 6 W. R., 287 [1866], and numerous cases cited in 13 W. R., 87.

[4] Taylor on Evidence, 4th ed., § 93. The passage, which in terms refers only to estoppel by deed, is as follows:—"Indeed the better opinion seems to be that where both parties to an indenture either know, or have the means of knowing, that it was executed for an immoral purpose, or in contravention of a statute, or of public policy, neither of them will be estopped from proving those facts which render the instrument void *ab initio*; for although a party will thus, in certain cases, be enabled to take advantage of his own wrong, yet this evil is of a trifling nature in comparison with the flagrant evasion of the law that would result from the adoption of an opposite rule."

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suppose, of saving it, into the names of other persons upon whom they think they can rely. I believe that it is good that parties in this country should understand that, in making arrangements in regard to their property for fraudulent purposes, such as defrauding creditors, they are entering upon a dangerous course, and that they must not expect the assistance of the Courts to extricate them from the difficulties in which their own improbity has placed them."[1]

Ram Sarun Singh *v.* Musst. Pran Pearee [1864].

The opposite view had, however, already been taken by other Judges, and there is much authority for the proposition that the parties may, as between themselves, shew the truth of the transaction. In *Ram Sarun Singh* v. *Musst. Pran Pearee*[2] the plaintiff and the defendants had, in a previous suit brought by certain reversioners, made certain statements to the effect that a mortgage was *bonâ fide* and for consideration, with the object of defeating the reversioners' claim which was a false one. The High Court held that the admission in the previous suit would operate to the fullest extent in favour of the reversioners, but that, in the present suit, it was open to the Court to enquire into the nature of the transaction and declare it void if it was satisfied that the transaction was not a *bonâ fide* one. As between two parties, both of whom were in fraud in making a particular statement, it is open to one to plead the truth and incapacitate the other from taking advantage of the fraud. "To rule otherwise," said Levinge, J., "would be to cripple the action of the Court and make it a vehicle for enforcing fraudulent deeds. In this case *no innocent party has been affected* by the admission or representation; it exhibits solely an attempt by one party to a fraudulent deed to gain an advantage over the other parties of the same deed, all equally participating in the fraud, founded on an admission made by the latter in the deed, without any intention that the former should benefit by it to the prejudice of the latter."[3]

This decision was upheld by the Privy Council. "It is in truth," said James, L. J., "the case of a common mortgage in which the defendant says there never was the money advanced. It is open to the mortgagor in this country to deny that the money, the

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[1] 13 W. R., 90.

[2] 1 W. R., 156 [1864].

[3] 1 W. R., 158, referring to *Heane* v. *Rogers*, 9 B. & C., 586, and *Freeman* v. *Cooke*, 2 Ex., 660.

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receipt of which is formally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing. That being so, and the instrument being relied upon by a person out of possession, seeking to obtain possession through the medium of a foreclosure suit, it appears to their Lordships that there is nothing whatever to prevent the defendant from shewing the real nature of the transaction. Then with regard to the supposed estoppel by pleading, it is equally clear that a pleading by two defendants against the suit of another plaintiff can never amount to an estoppel as between them."[1]

Calcutta decisions.

The decision in *Ram Sarun Singh* v. *Musst. Pran Pearee*[2] has been applied to this class of cases,[3] and it would now appear to be the law in Calcutta that the real nature of the transaction may be shewn either by the defendant or by a party claiming under him, and even where the object of the transaction is to obtain a shield against a creditor. Upon this principle, the parties, as between themselves, are not precluded from shewing that the property was not intended to pass by the instrument creating the benami. In *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*,[4] Couch, C. J., after referring to English cases[5] in which a similar principle had been recognised, said: "Although, no doubt, it is improper that transactions of this kind should be entered into .... if the Courts were to hold that persons were concluded under such circumstances, they would be assisting in a fraud, for they would be giving the estate to a person when it was never intended that he should have it." And this view has been acted upon at Allahabad in *Param Sing* v. *Lalji Mal*.[6]

A distinction is, however, suggested by Mr. Mayne[7] between the case where a third party has been actually defrauded by means

[1] 13 Moo. I. A., 551 (559) [1870]: See *Ramanugra Narayan* v. *Mahasundur Kunwar*, 12 B. L. R. (P. C.), 433 [1873]; *Srimati Sukhimani Dasi* v. *Mahendranath Dutt*, 4 B. L. R. (P. C.), 17 (28) [1869]; *Nawab Azimut Khan* v. *Hurdwaree Mull*, 13 Moo. I. A., 395 [1870].

[2] 13 Moo. I. A., 551 [1870].

[3] *Musst. Lutteefoonissa* v. *Goor Surun Doss*, 18 W. R., 485 [1872]; *Sreenath Roy* v. *Bindoo Bashinee Debia*, 20 W. R., 112 [1873]; *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*, 21 W. R., 422 [1874]; *Bykunt Nath Sen* v. *Goboollah Sikdar*, 24 W. R., 391 [1875]; *Mukim Mullick* v. *Ramjan Sikdar*, 9 C. L. R., 64 [1881]; and see *Param Singh* v. *Lalji Mal*, I. L. R., 1 All., 403 [1877].

[4] 21 W. R., 422 [1874].

[5] *Symes* v. *Hughes*, L. R., 9 Eq., 475 [1870]; *Tennent* v. *Tennent*, L. R., 2 H. L., 9 [1870].

[6] I. L. R., 1 All., 403 [1877].

[7] Hindu Law and Usage, § 405, and cases there cited. See the observations upon the maxim in *Param Singh* v. *Lalji*

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of the benami transaction, and the case where the fraud has not gone beyond the stage of intention, and he refers to English decisions as proceeding upon the maxim *in pari delicto potior est conditio possidentis*.

Bombay suggested distinction where fraud has not gone beyond intention.

And in the recent case of *Chenvirappa* v. *Puttappa*[1] great unwillingness was shewn to affirm the broad principle asserted in the Calcutta cases. In that case, two Judges of the Bombay Court expressed an opinion that where an illegal purpose has been effected by a transfer of property the transferee is not to be treated as a trustee holding it for the transferor,[2] and limited the effect of the decisions above cited to the case where a collusive transaction has merely proceeded to the length of a fictitious instrument passing between the parties, or where false declarations have been made by them in litigation for their common benefit, the transaction being still inchoate, and the violation of the law not having been completed. In such a case the Court considered that the apparent ownership might be displaced by the real, a suspensive condition being annexed to the initial acts of the parties of which Courts of Equity might take advantage. But where the fraudulent purpose had once been effected by the defeat of a third person's rights in Court, Equity would refuse to relieve the parties from the consequences of their collusion.[3] And this appears to be the view taken in England.[4]

Solution suggested in Babaji *v.* Krishna [1893]. Defendant may plead fraud; plaintiff may not.

In *Babaji* v. *Krishna*[5] the cases are distinguished as follows by Sargent, C. J.: "The judgments of the Privy Council in *Ram Sarun Singh* v. *Musst. Pran Pearee*,[6] and of the Calcutta High Court in *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*,[7] as delivered by Sir R. Couch, shew that it is open to the *defendant*

Mal, I. L. R., 1 All., 403 [410] cited in the chapter upon Estoppel by Matter in Writing, *infra*, Part I, Chapter X.

[1] I. L. R., 11 Bom., 708 (718, 719) [1887]. See the English cases there cited and discussed.

[2] Section 14 of the Indian Trusts Act (II of 1882) [which extends to Madras, the North-West Provinces, the Panjab, Oudh, the Central Provinces, Coorg and Assam] provides that "where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

[3] See the Chapter on Estoppel by Matter in Writing, Part I, Chapter X.

[4] See "May on Fraudulent and Voluntary Dispositions of Property," 2nd ed., 470—472.

[5] I. L. R., 18 Bom., 372 (374) [1893].

[6] 13 Moo. I. A., 551 [1870].

[7] 21 W. R., 422 [1874].

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to defend his possession by showing that the real transaction between himself and the plaintiff was to defraud, whether a third party or the defendant's creditors generally. The decision by Sir M. Westropp and Melvill, JJ., in *Mahadaji Gopal* v. *Vithal Bullal*,[1] followed in *Dharma Sakharam* v. *Nago Badgu*,[2] turns upon the special circumstances which in these cases were deemed to estop the defendant from pleading such a defence. The same question is much discussed in *Chenvirappa* v. *Puttappa*,[3] but we do not find that any authority of a Court of Equity is referred to in that case which questions the right of the *defendant* to plead such a defence whatever doubt there may be as to the plaintiff's right to avoid his own deed by setting up his own fraudulent act."

Transaction is void as against third party defrauded.

It is of course clear that where two persons have combined to defeat the title of a third, the Court will strip all disguises off the fraud, and, as between those parties *and the party defrauded*, will look at the transaction as it really is, applying the doctrine that a man cannot take advantage of his own wrong. Thus, in *Nawab Sidhee Nazir Ally Khan* v. *Rajah Ojoodhyaram*,[4] where there was a fraudulent agreement between the mortgagee's representatives in possession and the purchaser at a Government sale, both were held estopped as against the mortgagor from relying upon the illegality of their contract. The Judicial Committee held that, as between these parties, the sale must now be

Trust imposed.

regarded as a private sale, which imposed a trust upon the estate which passed by it. In *Gopi Wasudev Bhat* v. *Markande Narayan Bhat*,[5] the defendant obtained a sham decree against one Janu in collusion with him, and afterwards asserted his rights against the plaintiff, a *bonâ fide* purchaser for value. The Court observed: "Looking to the current of recent decisions,[6] we think they shew a strong tendency to refuse to give effect to fraudulent and fictitious transactions, and to undo them even in the interest of a party, where that can be done without unreasonable prejudice to the other party. And if such transactions will be set aside even at the suit of a party, much more may they be

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[1] I. L. R., 7 Bom., 78 [1881].
[2] Bom. P. J. for 1890, p. 275.
[3] I. L. R., 11 Bom., 708 [1887].
[4] 10 Moo. I. A., 540 [1866].
[5] I. L. R., 3 Bom., 30 (33) [1878].
[6] Referring to *Symes* v. *Hughes*, L. R., 9 Eq., 475 [1870]; *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*, 21 W. R., 423 [1874]; *R. Watson & Co.* v. *Gopee Soonduree Dossee*, 24 W. R., 392 [1875]; *Param Singh* v. *Lalji Mal*, I. L. R., 1 All., 403 [1877].

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treated as a nullity in the interest of an innocent purchaser for value."

Estoppel in cases of family arrangements.

The doctrine of estoppel by conduct has also been applied to the case of FAMILY ARRANGEMENTS made between the members for the sake of peace or the preservation of property, where such arrangements have been acquiesced in and acted upon, and in such cases the Court will not look so much to the adequacy of the consideration as to the motives and conduct of the parties. So in the case of *Lakshmibai* v. *Ganput*[1] where infants had, since attaining their majority, by their acts and conduct adopted the acts of their mother and guardian, and agreed to treat the will of a testator as valid, it was held that they had by ratification acquiesced in the disposition of the property and were estopped from disputing the provisions of the will.

Principles upon which enforced.

In the case last cited Couch, C. J., said: "In order to constitute a binding family arrangement, it is not necessary that there should be any formal contract between the parties, and if sufficient motive for the arrangement is proved, the Court will not consider the quantum of consideration: *Williams* v. *Williams*.[2] The fact that by their agreement the parties have avoided the necessity for legal proceedings is a sufficient consideration to support it: *Partridge* v. *Smith*;[3] *Naylor* v. *Winch*."[4]

Williams v. Williams [1866].

The principles upon which family arrangements are enforced in England are examined in the case of *Williams* v. *Williams* above cited, and would appear to be applicable in this country. In that case one J W died in 1831, leaving property of different kinds and an incomplete will by which, after making provision for his wife, he purported to give his property to his two sons in equal shares. The brothers agreed verbally that the invalidity of the will should make no difference, and for twenty years carried on partnership and dealt with the whole property as if it belonged

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[1] 5 Bom. H. C. R., 128 (O. C. J.) [1868].

[2] L. R., 2 Ch. Ap., 294 [1866].

[3] 9 Jur. N. S., 742 [1863].

[4] 1 Sim. & St., 554 [1824]. See for other cases of this class *Neale* v. *Neale*, 1 Keen., 672 [1837]; *Ford* v. *Stuart*, 15 Beav., 493 [1852]; *Stockley* v. *Stockley*, 1 V. & B., 23 [1812]; *Persse* v. *Persse*, 7 Cl. & F., 279 [1840]; *Hammersley* v. *Baron de Biel*, 12 Cl. & F., 45 [1845]; *Maunsell* v. *White*, 4 Cl. & F., 1039 [1854]; *Stapilton* v. *Stapilton*, 1 Atk., 2 [1739]; and the cases cited in the notes to White and Tudor's Leading Cases, 6th ed., vol. ii, 920. See *Rajunder Narain Rae* v. *Bijai Govind Singh*, 2 Moo. I. A., pp. 233, 234 [1839], as to agreements acknowledged in Court in compromise of conflicting claims.

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to them equally, the widow concurring in this arrangement down to her death. Upon the death of the younger brother (the partnership having already been dissolved), his representatives filed a bill against the elder brother for the equal division of the property. The defendant contended that there was no formal agreement for the division of the property and no consideration for the agreement, that if there was any agreement it could only have related to the property existing at J W's death, and that the arrangement had none of the ingredients of a family arrangement, there being no mutuality in it, no disputed rights, and no compromise of family differences. The Court of Appeal held, affirming the decree of Kindersley, V.C., that there had been an agreement between the brothers and the widow upon sufficient consideration. "It was strongly argued for the appellant," said Turner, L. J., "that this case does not fall within the range of the authorities; that those cases extend no further than to arrangements for the settlement of doubtful or disputed rights, and that in this case there was not and could not be any disputed right; but this is, I think, a very short-sighted view of the cases as to family arrangements. They extend. . .as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property. . . . . .and certainly in these cases this Court does not inquire into the quantum of consideration." [1]

Indian cases.

Where a reversioner took a prominent part in effecting the distribution of a deceased Hindu's estate, and became witness to an instrument executed for the purpose of adjusting the family disputes, it was held that he was estopped by his conduct from questioning the legality and genuine character of the arrangement and the validity of assignments made by persons taking shares under the arrangement.[2] Again, where the plaintiff, who had lived jointly with his father for upwards of twelve years after attaining majority and had acquiesced in his father's management of the property, sued to recover a share of the property which had been sold in execution of a decree against his father alone,

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[1] L. R., 2 Ch. Ap., 294 (304) [1866].

[2] *Sia Dasi* v. *Gur Sahai*, I. L. R., 3 All., 362 [1880].

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the decree having been obtained in respect of a debt incurred under circumstances which would preclude the sons from contesting it, he was held by his conduct to have acquiesced in his father's dealings with the property.[1]

In *Tennent* v. *Tennent*,[2] Lord Westbury states that in family agreements it is required that there shall be on all sides *uberrima fides*.

Waiver.

A party may, by conduct of waiver, be estopped from insisting upon a binding family arrangement. Where the plaintiff had defended a previous suit on the ground of her preferable right to inherit, and afterwards sued the plaintiff in the former suit upon the basis of a valid family compact varying the ordinary rules of inheritance to recover half the property, Holloway, C. J., said : "There is another perfectly satisfactory ground for saying that this suit cannot be maintained. The plaintiff now insists upon a valid family compact varying the ordinary rules of inheritance. She has, however, previously appealed to the general rule, litigated the matter through three Courts, designedly keeping back the compact upon which she now seeks to insist. There can be no stronger case of an absolute waiver of that contract, and of conduct rendering it wholly inequitable to permit her now to insist upon it." [3]

Estoppel by partition between the members of a family *inter se* and in favour of purchasers.

Similar to the estoppel arising in cases of family arrangements is that which operates where there has been a binding partition entered into and acted upon. Where the plaintiffs, members of a joint Hindu family, alleged that a solemn deed, registered and purporting to effect a valid partition of the family property, was never acted upon and was a mere device to defeat creditors, it was held that it lay upon them to make out a sufficient case to set aside the deed which was *primâ facie* valid and operative.[4] The members of the family will not only be estopped as between themselves but as against purchasers. "Whatever may be the intention of the members, purchasers at least have an undoubted right to bind them by their public acts to the fulfilment of those obligations

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[1] *Damudar Dass* v. *Muhoram Pandah*, 13 C. L. R., 96 [1883].

[2] L. R., 2 Sc. Ap., 6 (10) [1870].

[3] *Janaki Ammal* v. *Kamalathammal*, 7 Mad. H. C., 263 [1873].

[4] *Srimati Sukhimani Dasi* v. *Mahendra Nath Dutt*, 13 W. R., 14; 4 B. L. R. (P. C.), 16 [1869]. See *Sreematty Shamasoondery Dossee* v. *Kartick Churn Mitter*, Bourke (O. C), 326 (334) [1865].

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which such public acts cast upon them."[1] These observations, as pointed out by the Privy Council, were not intended to shake the credit of the numerous decisions which have established between the apparent and the real title that a benami transaction, void of fraudulent design, may be made the foundation of a decree in a Court of Justice.[2]

Nor is it necessary that there should be a partition by metes and bounds. The agreement itself, and the position of persons affected by it, being the foundation of the estoppel, evidence that a binding partition has taken place will be sufficient.[3] Thus where three brothers entered into deeds of compromise and partition and upon the death of one, another sued his co-survivor for the share to which he would have been entitled under the will of their father, the Privy Council held that, even if the plaintiff were entitled under the will, every interest which he had or could claim thereunder had passed by the deeds.[4]

Estoppel in cases of adoption.

Where an invalid ADOPTION has been acted upon and recognised by the members of a family, and the person adopted has changed his situation, an estoppel may in certain cases arise. In such a case the person whose interest it is to maintain the adoption will be supported by a very strong presumption in his favour similar to that which arises when the legitimacy of a person in possession of property is questioned by a person who has a strict right to question it. The case of a Hindu claiming by adoption is perhaps as strong as any case of this kind, because he loses any rights which he may have had in his own family, and it would be unjust to deprive him of the status which he has acquired in his adoptive family except upon the strongest proof of the alleged defect in his title. These principles have been laid down by the Privy Council in the case of *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee*.[5]

Presumption in favour of adopted son.

Foundation of the estoppel.

The presumption is strengthened by the active acquiescence of members of the adoptive family when they have signified their complete concurrence in the adoption, and have encouraged the

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[1] 4 B. L. R. (P. C.), 29.

[2] Ib., 29.

[3] See *Ananta Balacharya* v. *Damodhar Makund*, I. L. R., 13 Bom., 25 [1888] and the cases, *infra*. Part II, Chapter VI, upon the conclusiveness of Partition Proceedings.

[4] *Greender Chunder Ghose* v. *Troylokho Nauth Ghose*, L. R., 21 I. A., 65 [1892].

[5] 14 Moo. I. A., 67 [1871]. See the subject discussed in Mayne's Hindu Law, § 148; West and Bühler, 3rd ed., 1097.

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person adopted to believe in the validity of his adoption. Acts, such as concurrence in the performance of the funeral ceremonies of the adoptive father, and a long course of conduct shewing conclusive acquiescence in the validity of the adoption, will raise an estoppel in favour of the adopted son.[1] Such acts, however, on the part of the family would hardly be strong enough unless the person adopted has, through the influence of the course of the representation by conduct, so altered his situation that it would be impossible to restore him to that original situation.[2]

Where an adoption was acquiesced in for many years, it was held that the consent of some person competent to give away the adopted son should be presumed ;[3] and in a suit for a declaration that an adoption long acted upon was fraudulent, the Court held that the onus was on the plaintiff to establish the fraud which he alleged.[4]

It would seem, however, that admissions made under a mistake of law do not necessarily generate an estoppel in these cases.[5] The real test to be applied is whether the plaintiff has changed his position.

The position of the party seeking to avail himself of the estoppel is to be looked to.

The broad principles expressed in the earlier Madras case were subsequently questioned by a Full Bench of the Court in *Vishnu* v. *Krishnan*.[6] The Court stated that the rule of estoppel by conduct does not apply where an invalid adoption is made by a person under the full belief that it is valid in law, even where the person adopted is induced by the conduct of the person adopting him to abstain from claiming a share in the inheritance of his natural family. The Court based their decision upon a narrow construction of the term "intentionally" in Section 115 of the Evidence Act which was taken to be less comprehensive than the term

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[1] *Sadashiv Moreshvav* v. *Hari Moreshvar*, 11 Bom. H. C. R., 190 [1874]; *Chintu* v. *Dhondu* (note p. 192) ; *Ravji Vinayakrav* v. *Lakshmibai*, I. L. R., 11 Bom., 381 [1887]; *Kannammal* v. *Virasami*, I. L. R., 15 Mad., 486 [1892]. But see *Tayammaul* v. *Sasachella Naiker*, 10 Moo. I. A., 429 [1865].

[2] *Gopalayyan* v. *Raghupatiyyan*, 7 Mad. H. C. R., 250 (256) [1873]. See *Gopee Lall* v. *Mussamut Sree Chundraolee Buhoojee*, 11 B. L. R. (P. C.), 391 (395) ; 19 W. R., 12 [1872] ; *Parvatibayamma* v. *Ramakrishna Rau*, I. L. R., 18 Mad., 145 [1894], where the cases are collected.

[3] *Anandrav Sivaji* v. *Ganesh Eshvant*, 7 Bom. H. C. R. (App.), 33 [1863].

[4] 21 W. R., 84 [1873].

[5] See *Kuverji* v. *Babai*, I. L. R., 19 Bom. 374 [1890]. A case decided before *Sarat Chunder Dey's case*, but for some reason reported later ; *Jhinguri Tewari* v. *Durga*, I. L. R., 7 All., 878 [1885].

[6] I. L., R. 7 Mad., 3 [1883].

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"wilfully" in *Pickard* v. *Sears*[1] and *Freeman* v. *Cooke*.[2] The decision is now overruled as to this point by the recent case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*[3] in the Privy Council; and in *Kannammal* v. *Virasami*[4] the earlier principle is reasserted by a Division Bench of the Madras Court in the following terms: "We have been referred to the decisions in *Chitko* v. *Janaki*[5] and *Ravji Vinayakrav* v. *Lakshmibai*,[6] in both of which it was held that the conduct of the person who actively participated in the adoption estopped him from disputing the validity of the adoption. It seems to us that this is just such a case as Section 115 of the Evidence Act was framed to meet."

Recognition of person as member of a Hindu family.

Upon the estoppel which may arise by recognition of the rights of a person as a member of a Hindu joint family, the recent case of *Lala Muddun Gopal Lal* v. *Khikhinda Koer*[7] may be mentioned. There the elder of two brothers, Kuldip, for some years recognised the younger Sadhoram (who had been born deaf and dumb), as having a joint interest in the family property. The Judicial Committee held that there was no ground for supposing that Kuldip intended to divest himself of his own property, or to waive any rights accruing to him by reason of Sadhoram's incapacity, observing: "Their Lordships think it would not be reasonable or conducive to the peace and welfare of families, to construe acts done out of kindness and affection to the disadvantage of the doer of them, by inferring a gift when it is plain that no gift could have been intended. . . they are equally clear that there is no principle of law, founded on the doctrine of estoppel or laches, or the law of limitation or otherwise, which compels them to hold that under the circumstances of this case, Kuldip's acts and conduct had an effect and operation which he could not have intended or contemplated."

Conduct will always be evidence.

It is scarcely necessary to observe that a mere passive acquiescence by one in the infringement of his rights by another will not

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[1] 6 A & E., 469 [1837].
[2] 2 Ex., 654 [1848].
[3] L. R., 19 I. A., 203 [1892].
[4] I. L. R., 15 Mad., 486 [1892].
[5] 11 Bom. H. C. R., 199 [1874], where the adopted son was held estopped from questioning the adoptive mother's life interest, the adoption having taken place upon the understanding that such interest should be reserved to her.
[6] I. L. R., 11 Bom., 381 (396) [1887].
[7] I. L. R., 18 Calc., 341 [1890].

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create an estoppel in cases of this kind.[1] There must be conduct of some kind on the part of the former inducing the latter to change his situation. What is to be looked to is the position of the party seeking to avail himself of the estoppel. But conduct not amounting in law to an estoppel may, nevertheless, be strong evidence. In *Agrawal Singh* v. *Foujdar Singh*[2] the plaintiffs had treated the defendants as being in equal relationship to a common ancestor, and had permitted their names to be registered as such at the Collectorate. In a suit to establish that, when the succession opened out, they were one degree nearer than the defendants to the common ancestor, the Judicial Committee held that the plaintiff's course of conduct, though not amounting to an estoppel in point of law, threw upon them a heavy burden of proof which, in their Lordships' opinion, had not been sustained.

Relation of trust.

The relation in many of the above cases is, as already pointed out, one of *trust*. The real owner who allows another to deal with his property may not inaptly be described as a trustee for third parties dealing with the benamidar. Parties colluding to defraud creditors place themselves in a relation of trust to such creditors. And in the cases of partition and adoption above noticed the prevailing idea appears to be one of trust. Perhaps the application of the term may be considered inappropriate, but the relation between the parties in the above cases is scarcely one of contract.

Trustee and cestui-que-trust.

In this connection may be noticed the estoppels in the cases of trustee and cestui-que-trust. The position of a trustee is this, that he is under no obligation to assist his cestui-que-trust in selling or encumbering his beneficial interest, although he is bound to give him all reasonable information. *A fortiori*, he need not answer the inquiries of a stranger about to deal with the cestui-que-trust, and if he does so, he is only bound to answer to the best of his knowledge and belief. But he may estop himself as regards a stranger by making a representation of a positive nature such as would

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[1] See *Taruck Chunder Bhuttacharjee* v. *Haro Sunker Sandyal*, 22 W. R., 267 [1874]: *Rama Rau* v. *Raja Rau*, 2 Mad. H. C. R., 114 [1864]; *Peddamuthaluty* v. *Timma*, ib., 270; *Rajan* v. *Basuva*, ib., 429; *Uda Begam* v. *Imam-ud-din*, I. L. R., 1 All., 82 [1875]; where the doctrine of acquiescence is discussed.

[2] 8 C. L. R., 346 [1880].

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mislead any reasonable man. Such appears to be the effect of *Low* v. *Bouverie*.[1]

If a creditor misleads an executor and thereby induces him to part with assets in a manner which would be a *devastavit*, it would seem that he cannot complain, if there has been conduct or express authority on his part,[2] or a long course of acquiescence: and it may be that such a rule would apply in the case of a beneficiary who has induced his trustee to purchase trust property, or otherwise to commit a breach of trust.[3] But a trustee may not set up any title adverse to that of the cestui-que-trust.[4] And to raise an estoppel against a cestui-que-trust either by concurrence or acquiescence, there must clearly be the fullest knowledge and an active course of conduct on his part.[5]

"It is a common principle of law," observed Sir John Romilly, M. R., in *Newsome* v. *Flowers*,[6] "that a tenant who has paid rent to his landlord cannot say 'you are not the owner of the property;' the fact of his having paid rent prevents his doing it. The same thing occurs where persons are made trustees for the owner of property: if they acknowledge the trust for a considerable time, they cannot say that any other persons are their *cestui-que-trust*, or 'we will turn you out of the property.'"

In *Gulzar Ali* v. *Fida Ali*[7] a trustee, who had mortgaged trust property upon the allegation that it was his own property, subsequently sued to recover the property from the purchaser at the execution-sale on the ground that it was trust property, and that he had no power to mortgage. It was held that he could not be allowed to recover upon the strength of a title antagonistic to his former representations.

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[1] L. R., '91, 3 Ch., 82, where it is stated that *Burrowes* v. *Lock*, 10 Ves., 470 [1805], can only be explained on the ground of estoppel.

[2] See *In re Birch*, L. R., 27 Ch. D., 622 (627) [1884]; *Richards* v. *Browne*, 3 Bing. (N. C.), 493 [1837]; *Jewsbury* v. *Mummery*, L. R., 8 C. P., 56 [1872].

[3] See *Griffith* v. *Hughes*, L. R., '92, 3 Ch. 105, a decision upon 51 & 52 Vict., c. 59, s. 6.

[4] Act II of 1882, s. 14; Bigelow on Estoppel, 5th ed., 545. A trustee is not liable for joining *pro formâ* in receipts. See Lewin on Trusts, 8th ed., 264, and *cf.* Act II of 1882, s. 26.

[5] See Lewin on Trusts, 8th ed. (1885), pp. 495, 496, 918—924. See Act II of 1882, ss. 23, 62, 68.

[6] 30 Beav., 461 (470) [1861]. See also *Attorney-General* v. *Monro*, 2 DeG. & Sm., 122 (163) [1848].

[7] I. L. R., 6 All., 24 [1883].

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CHAPTER III.

Landlord and Tenant.

Tenant's Estoppel founded on contract for permissive occupation—Rule is of modern origin—Section 116 of the Evidence Act—Classification—Tenant's estoppel, general rule stated—*Alchorne* v. *Gomme* [1868]—Indian cases—Estoppel even where the landlord has no legal estate—*Morton* v. *Woods* [1869]—Estoppel by intendment of law—Estoppel extends to licensees and trespassers—*Doe d. Johnson* v. *Baytup* [1835]—Licensee of Julkur—Estoppel available for and against persons claiming through landlord or tenant—Tenant may, however, shew that landlord's title has determined—*Hopcraft* v. *Keys* [1833]—Even where rent has been paid by mistake—*Claridge* v. *Mackenzie* [1842]—Reason for the rule: the tenant is liable to the person who has the real title—Estoppel operates only during the continuance of the tenancy—Estoppel against landlord inducing his tenant to attorn to another—Tenancy determined by estoppel—Surrender by operation of law—*Lyon* v. *Reed* [1844]—Implied surrender—Estoppel by payment of rent—Payment must have been made as for rent due without misrepresentation and under no mistake—Fraud or misrepresentation—Mistake or misapprehension—*Banee Madhub Ghose* v. *Thakur Doss Mundle* [1866]—Presumption of attornment may be rebutted—Tenant may shew that he has derived possession from former owner—*Cornish* v. *Searell* [1828]—May deny derivative title of landlord—*Doe d. Higginbotham* v. *Barton* [1840]—*Lall Mahomed* v. *Kallanus* [1885]—Tenant may shew affirmative title - Benami title of landlord may be shewn—*Donzelle* v. *Kedarnath Chuckerbutty* [1871]—Tenant may not set up benami title against landlord—Landlord's estoppel a branch of title by estoppel—Estate by estoppel—Other estoppels against the landlord.

Tenant's estoppel founded on contract for permissive occupation.

The modern estoppel by which a tenant is precluded from denying his landlord's title is founded on the contract between the parties, and its object has been stated to be to create a sort of specific performance.[1] "So long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of the lessor, really

[1] *Per* Martin, B., in *Duke* v. *Ashby*, 7 H. & N., 602 [1862]. The principle is clearly stated by Jessel, M. R., in *In re Stringer's Estate*, L. R., 6 Ch. D., 9, 10 [1877]. "Where a man having no title obtains possession of land under a demise by a man in possession who assumes to give him a title as tenant he cannot deny his landlord's title . . . . That is a perfectly intelligible doctrine. He took possession under a *contract* to pay rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admits and under whose title he took possession has not a title. That is a well-established doctrine. That is estoppel by *contract*."

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is? All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it."[1] Two conditions require to be satisfied to create that consideration upon which the estoppel is founded. *Possession* must be given to the tenant, and the tenant must take possession by his landlord's *permission*.[2] When permissive enjoyment is established, the relation of landlord and tenant is created, and, with certain exceptions hereafter to be noticed, the lessee is not allowed to question his lessor's title during the continuance of the lease. In many instances, the landlord has only an equitable title, and yet the tenant is estopped from questioning such title.[3]

Rule of modern origin.

The estoppel in its modern form is stated by Mr. Bigelow to have had its origin in the old action of assumpsit for use and occupation of land by which compensation for the daily enjoyment of the land was sought to be recovered.[4]

The modern rule appears to be no older than the middle of the eighteenth century.[5]

116, Act I of 1872.

The rule in this country is contained in Section 116 of the Evidence Act.[6] This provision of the law does not debar one

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[1] *Per* Martin, B., in *Cuthbertson* v. *Irving*, 4 H. & N., 758 [1859]. "The principle upon which such cases rest, is one of the broadest in the law, to wit, that one who has received property or money from another shall not dispute the title of that person or his right to do what he has done." Bigelow on Estoppel, 5th ed., 545. So where a person enters into a contract to purchase lands and takes possession, the relation of landlord and tenant is created. [See *Doe dem Bord* v. *Burton*, 16 Q. B. (A. & E.), 807 [1851]; Dart., Vendors and Purchasers, 6th ed., 503, 504.]

[2] Bigelow on Estoppel, 5th ed., 509.

[3] *Per* Blackburn, J., in *Board* v. *Board*, L. R., 9 Q. B., 53 [1873].

[4] See Bigelow on Estoppel, 5th ed., 454, 506. That learned author points out that estoppel against the tenant in the time of Lord Coke was raised by the acceptance of a sealed lease which produced the same conclusive effect as the estoppel by record or by deed when the tenant held over after the lease had terminated. The estoppel depended upon the prior existence of the deed.

[5] See *Doe d. Knight* v. *Smythe*, 4 M. & S. [1815], *per* Dampier, J., 349: "It has been ruled often that neither the tenant nor any one claiming by him can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. This has been the rule for the last 25 years," and see *Doe d. Bristow* v. *Pegge* [1785]. 1 T. R., 758 (*n*), *per* Buller, J. See further as to the estoppel the notes to *Veale* v. *Warner* and *Walton* v. *Waterhouse* in Williams' Saunders, vol. i, 575, ii, 826 [ed. 1871].

[6] I of 1872. "No tenant of immoveable property or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given."

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who has once been a tenant from contending that the title of his landlord has been lost, or that his tenancy has terminated, but only precludes him from saying during the continuance of the tenancy that his landlord had no title at the commencement of the tenancy.[1] It has also been ruled that the words "at the beginning of the tenancy" in that section only apply to cases in which tenants are put into possession by the person to whom they have attorned, and not to cases where they have previously been in possession.[2] This case will be considered later on. These are the only decisions in which the Indian Courts have expressed a definite opinion as to the scope of the section. It is submitted that the section does not embody any rule of law different to the rules laid down upon this subject by the English Courts.[3]

Classification. Tenant's estoppel.

The estoppels between landlord and tenant, and the exceptions, may be presented in the following form :[4]—

I.—The relationship of landlord and tenant is created—

Actual title.

(A) where the landlord has let the tenant into possession of the land by a contract, written or verbal.

The tenant cannot deny that his landlord had a title at the time he was let into possession, but he may plead—

(i) that he has given notice to the landlord that the latter's title has expired, or has been defeated by title paramount, *e.g.*, avoided by sale for arrears of revenue, and that he will in future claim under another title ;—

(ii) that he has openly surrendered the land to the landlord;

(B) and may be inferred from the payment of rent, attornment, or other circumstances.

The same estoppel and the same defences apply.

The tenant may, in addition, shew mistake.

Derivative title.

II.—Where the landlord claims under a title derived from the person who let the tenant into possession. This may be—

(*a*) by assignment (gift, sale, devise, lease) ;

(*b*) by inheritance, including adoption.

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[1] *Ammu* v. *Ramakishna Sastri*, I. L. R., 2 Mad., 226 [1879], *per* Sargent, C. J., and Muttusami Ayyar, J. See *Subbaraya* v. *Krishnappa*, I. L. R., 12 Mad., 422 [1888].

[2] *Lal Mahomed* v. *Kallanus*, I. L. R., 11 Calc., 519 [1885].

[3] See the observations as to s. 115 in *Sarat Chunder Dey* v. *Gopal Chunder Laha*, L. R., 19 I. A., 203 ; I. L R., 20 Calc., 296 [1892].

[4] See Mr Justice Field's classification for another purpose in *Lodai Mollah* v. *Kally Dass Roy*, I. L. R., 8 Calc., 238 [1881].

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(i) where the tenant has attorned to the landlord, he may, under certain circumstances, shew that the title is not really in the landlord but in some other person ;

(ii) where there has been no attornment the question will be whether the landlord has succeeded in proving his title.

Landlord's estoppel.

III.—Certain estoppels available to the tenant against the landlord require to be noticed hereafter.[1]

First as to the estoppel in favour of the landlord, or TENANT'S ESTOPPEL.

Tenant's estoppel, the general rule stated.

To proceed to the analysis of the leading principles :—The general rule may be stated as follows : A tenant cannot, while in possession, set up another title so as to overthrow the title of his landlord, or otherwise dispute that title. "The rule," said Best, C. J., in *Alchorne* v. *Gomme*,[2] "which prohibits a tenant from disputing in a Court of law the title of his landlord, is a wise rule tending to general convenience . . . . . I am aware that there is a qualification of this rule, if qualification it can be called, and that there are cases in which the tenant has been permitted to shew that a landlord could not justify a distress : in all of them, however, the right of the landlord to demise has been admitted, and the plea has been either that his title has since expired, or that the tenant has been compelled to pay sums which he was entitled to deduct from the rent ;[3] these cases therefore rather confirm than impeach the general rule ; but the tenant here broadly disputes the lessor's right to demise."

Alchorne v. Gomme [1824].

In the case now cited the tenant pleaded that, before the landlord had anything in the premises and before the demise, the premises had been mortgaged by the person under whom the landlord claimed. The mortgage being forfeited, the mortgagee distrained upon the tenant for the rent, and to save his goods from being sold the tenant *attorned to the mortgagee* and paid the rent to him. It was held that the tenant could not, in an avowry

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[1] *Infra*, pp. 104—107.

[2] 2 Bing., 54 [1824].

[3] In *Taylor* v. *Zamira*, 6 Taunt., 524 [1816], where the premises were granted subject to an annuity, and there was a covenant that the grantee might distrain on the premises, the tenant was allowed to shew that he had paid the rent to the grantee, and was therefore not in arrear to his landlord.

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of distress for rent, set up the mortgagee's title against his landlord.[1]

Indian cases.

Mohesh Chunder Biswas v. *Gooroopersad Ghose*[2] well illustrates the application of the general rule in India. There the plaintiff alleged that he had granted a lease of rent-free land to the defendant who occupied, and held over after the expiration of the term, claiming that the land was *mâl* and not rent-free, and that he held under the zemindar. The plaintiff's tenure was found to be invalid by the lower Appellate Court. "We are of opinion," said Raikes and Sumbhoonath Pundit, JJ., in remanding the case, "that the only point for determination was, whether the defendant held as lessee of the plaintiff, and that, if he did, he could not raise any question regarding the validity of his lessor's title; and if he did not so hold, then the plaintiff's case was at an end. Of course, whatever decision the Court might arrive at with respect to that question, and however it might determine the rights of the parties in this suit, the rights of the zemindar could not be affected thereby, or his title to resume, in a suit properly constituted, be prejudiced. But in this suit it is not competent to the defendant to raise any question respecting the validity or invalidity of the plaintiff's title."

So where the plaintiff claimed as mortgagee in possession of the defendant's lessor to recover arrears of rent and for ejectment, and the defendant had acknowledged that the plaintiff was in possession, and had on several occasions paid rent to him, it was held that the defendant, having in fact attorned to the plaintiff as his landlord, could not be allowed to question the validity of his title on the ground that the mortgage-deed had not been duly registered.[3]

And it has been held that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive the rent or sue in ejectment.[4]

Estoppel even where the landlord has no legal estate.

The rule that there can be no estoppel where the truth appears has been recognised in India to some extent,[5] but the general rule

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[1] For other illustrations of the rule, see *Doe d. Ogle* v. *Vickers*, 4 Ad. & E., 782 [1836]; *Doe d. Hurst* v. *Clifton*, 4 Ad. & E., 809 (813) [1836]; *Obhoy Gobind Chowdhry* v. *Beejoy Gobind Chowdhry*, 9 W. R., 162 [1868].

[2] Marsh., 377 [1863].

[3] *Shums Ahmud* v. *Goolam Moheeooddeen*, 3 N.-W. P. (H. C.), 153 [1871].

[4] *Jamsedji Sorabji* v. *Lakshmiram Rajaram*, I. L. R., 13 Bom., 323 [1888].

[5] Part I, Chapters II, X, XI.

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above stated is subject to no such qualification, and the tenant will be estopped even where it appears upon the face of the transaction that the landlord has no legal estate. In such a case the estoppel arises by intendment of law from the relation which the parties have agreed to constitute between themselves.

Morton v. Woods [1869].

Thus in *Morton* v. *Woods*,[1] the mortgagor in possession executed a second mortgage to the defendants, reciting a previous mortgage, and as further security for the principal and interest due to the defendants, attorned tenant to them, their heirs and assigns, for a term of ten years at a yearly rent payable upon a certain fixed date, with power to them to enter and take possession at any time. The defendants having made advances, the mortgagor remained in possession, but failed to pay the first year's rent. The defendants having distrained, the plaintiffs brought an action as creditor's assignees of the mortgagor's estate to recover damages for the distress. The Court of Queen's Bench held[2] that the distress was valid. Upon a case stated in error, the Court of Exchequer Chamber upheld this decision upon the same grounds, *viz.*, that the intention of the parties was to create a tenancy-at-will, that both parties had assented to this arrangement, and the mortgagor having held possession as tenant-at-will was estopped from shewing that the defendants had no legal reversion, although it appeared upon the face of the mortgage-deed that the mortgagor had only an equity of redemption, and the defendants had therefore no legal estate.

Estoppel by intendment of law.

The judgment of the Court,[3] which was delivered by Kelly, C.B., proceeds upon the authority of *Jolly* v. *Arbuthnot*,[4] citing and commenting upon the previous cases, and contains a clear statement of the law upon this point.[5]

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[1] L. R., 4 Q. B., 293 [1869].

[2] L. R., 3 Q. B., 658.

[3] Kelly, C.B., Channell and Cleasby, B. B., and Byles and Keating, JJ.

[4] 4 DeG. & J., 224; 28 L. J. (Ch.), 547 [1859].

[5] "And first as to the objection that the defendants, not having the legal estate, could have no right of distress. That they had not, in fact, the legal estate, is clear; but that may be said of all lessors where there is a lease and a tenancy by estoppel, and where the lessors have frequently no title at all; here the defendants have an equitable title only, and the question becomes of primary importance, because it is only by estoppel that the defendants can be said to have the legal estate; and it is said that no estoppel arises where the truth appears on the face of the instrument, which is the evidence of the agreement between the parties . . . . But even if any of the decisions or *dicta* were to lead to the conclusion that where the truth

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Estoppel extends to licensees and trespassers.

The law implies a tenancy in the case of a licensee, and *à fortiori* where a person who has fraudulently obtained permission to go upon the land insists upon holding against the party in possession. In *Doe d. Johnson* v. *Baytup*,[1] the defendant, a daughter of the plaintiff's lessor, obtained possession of the premises upon the pretext of getting vegetables in the garden, and refused to vacate on the ground that the plaintiff had no title. The Court of King's Bench[2] held that she could not defend an ejectment, as she held as a mere licensee and had, moreover, obtained possession by fraud.[3] The rule, however, does not apply as between a lessor who has no title to the premises and a third person who has brought goods upon the land by the license of the lessor's tenant.[4]

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appears there can be no estoppel, that doctrine must be taken to be overruled by *Jolly* v. *Arbuthnot* [4 DeG. & J., 224]; and that being the decision of the Lord Chancellor on appeal is a decision of a Court of co-ordinate jurisdiction, and we should be bound to defer to it. Now in that case we find there was a mortgage and an agreement by way of attornment, or a clause in the deed that a tenancy should exist between the mortgagor and a receiver appointed by the parties; and it is perfectly manifest that a mere receiver so appointed would have no legal or indeed equitable estate in him, and his character of receiver and the absence of any interest in the estate appeared on the face of the deed. The Master of the Rolls [28 L. J. (Ch.), 274] held that the receiver had no right of distress by virtue of such tenancy. But Lord Chelmsford, C., reversed that decision, and held that the fact of the want of the legal reversion appearing on the face of the deed by virtue of which the tenancy was created did not do away with the tenancy or right of distress, which arose by intendment of law from the relation of landlord and tenant, or from the express agreement of the parties. . . . His Lordship then refers to *Cornish* v. *Searell* [8 B. & C., 471, and *Dancer* v. *Hastings* [4 Bing., 2; 12 Moo., 34] as supporting this view."

[1] 3 Ad. & E., 188; 4 Nev. & Man., 837 [1835].

[2] Denman, C.J., Littledale, Patteson and Coleridge, JJ.

[3] "In the case of a person who has become tenant, there is no doubt as to the law. *Doe d. Knight* v. *Lady Smythe* [4 M. & S., 347], shews that he must first give up possession to the party by whom he was let in, and then, if he, or any one claiming through him, has a title *aliunde*, that title may be tried by ejectment. It was held in that case, not that the party claiming as landlady to the tenant was altogether estopped from trying the right, but that the tenant must first restore possession. If the defendant here has any right, she might, in the first instance, have brought ejectment, or have entered on Mrs. Johnson and disseised her. But she takes neither course. She fraudulently obtains permission to go upon the land, and then turns upon the lessor of the plaintiff and insists upon holding the land. The rule, as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission as a mere lodger or as a servant."—*Per* Patteson, J. "There is no distinction between the case of a tenant and that of a common licensee. The licensee, by asking permission, admits that there is a title in the landlord."—*Per* Coleridge, J.

[4] *Tadman* v. *Henman*, '93, 2 Q. B., 168 [1893]: "X lets land to which he has no title to N. A brings goods of A's upon the land. Though N, the tenant, is estopped from disputing X's title as lessor, A is clearly not estopped from disputing it. The consequence is that X cannot as against A exercise his rights as landlord and distrain A's goods in payment of rent due from N."—L. Q. R., Vol. IX, 309.

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"It is true," said Charles, J., in the case now cited, "that the plaintiff brought her goods on to the premises by the license of her husband who was the defendant's tenant; but she did not claim thereby to acquire any possession of or interest in the premises."

Licensee of julkur.

In *Gour Huri Mal* v. *Amirunnessa Khatoon*[1] the plaintiff sued to eject the defendants from a julkur mehal. The defendants had paid rent to the plaintiff and his predecessors, and the Court regarded them as licensees liable to have their license determined. The defence set up was that the defendants, as members of the public community, were entitled to exercise their right of fishery in a navigable river, and that neither the Government nor the plaintiff could claim exclusive rights. The Court held that the defendants, being licensees, and having paid rent, were precluded from setting up this special defence.

Estoppel available for or against persons claiming through landlord or tenant.

The estoppel operates against persons claiming through the tenant, as for instance sub-lessees, and *à fortiori* against persons coming in by collusion with the tenant,[2] and is available to persons standing in the same position as the lessor.

In *Doe d. Bullen* v. *Mills*[3] the action was for ejectment in respect of a cottage. Bullen, the plaintiff's lessor, finding one Williams in possession, induced the latter to take a lease from him. The defendant, having become proprietor of adjoining land, offered Williams £20 to give up the cottage to him. At the trial the defendant offered to prove that he was entitled to the land upon which the cottage stood under the same title under which he held the adjoining close. The objection that the defendant, having come in under Williams who was in possession under Bullen, was not at liberty to question Bullen's title was upheld by the Court of King's Bench,[4] the defendant being in the position of assignee of the lease.[5]

Where the defendant came into possession of land as lessee of the plaintiff's tenant at a time when the plaintiff's title to the land had determined under the Lands Clauses Consolidation Act,[6] the

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[1] 11 C. L. R., 9 [1882].

[2] *Pasupati* v. *Narayana*, I. L. R., 13 Mad., 335 [1889].

[3] 2 Ad. & E., 17 [1834].

[4] Denman, C. J., Taunton, Patteson and Williams, JJ.

[5] See *Doe d. Knight* v. *Smythe*, 4 M. & S., 347 [1815].

[6] 8 & 9 Vict., c. 18, s. 127 [corresponding in some measure with the Land Acquisition Act (I of 1894).]

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Court of Common Pleas held he was in no better position than his lessor, who, by holding on as tenant from year to year, was estopped from disputing the plaintiff's title.[1]

In *Rennie* v. *Robinson*[2] the defendant hired apartments by the year from one Williams, who afterwards let the entire house to the plaintiff. In an action for use and occupation, the Court of Common Pleas held that the defendant, having used and occupied the premises under a lease from Williams, was not competent to impeach either his title or that of the plaintiff who claimed through him.

Tenant may show that landlord's title has determined.

The first important qualification of the main rule is that a tenant may shew that his landlord's title has expired or determined. In *Hopcraft* v. *Keys*[3] the plaintiff had been evicted by title paramount to the defendant's, but afterwards regained possession under a new agreement with the person who had evicted him. In an action of replevin to try the validity of a distress levied by the defendant, it was proved that the plaintiff was let into possession by one Hawkins, who undertook to finish the premises and to give plaintiff a lease at the end of the year. Hawkins had no other title than an agreement to lease given by one Kent, by which the latter reserved to himself the power of re-entry and avoiding the agreement if the houses were not completed within six months. Kent re-entered for the condition broken and evicted the plaintiff. Subsequently Kent finished the house, and the plaintiff re-entered under a new agreement with him. It was contended that the plaintiff having taken under Hawkins, was estopped to say he had no title. The Court of Common Pleas held he was not,[4] upon the ground that at the time of the

Hopcraft *v.* Keys [1833]. A new and distinct holding.

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[1] *London and North-Western Railway Co.* v. *West*, L. R., 2 C. P., 553 [1867]. See *Barwick* v. *Thompson*, 7 T. R., 483 [1798].

[2] 1 Bing., 147 [1828].

[3] 9 Bing., 613 [1833].

[4] Tindal, C.J., said: "I hope nothing which I am about to observe will be supposed to break in upon the established rule of law, that the tenant, so long as he remains in possession, shall never be allowed to dispute the title of the landlord from whom such possession was received. But upon the facts proved at the trial of this cause, that rule, as it appears to me, does not apply to the present case; for, upon the whole of the evidence, Hopcraft, at the time of distress, was not in possession under any tenancy he derived from Hawkins, but under a new and distinct holding which he took from Kent, at a period long subsequent to the time when Hawkins' title had expired. . . [after stating the facts] I thought, therefore, at the trial and I still think, that it was competent for the plaintiff to shew that his landlord had a defeasible title only, and that such title was actually defeated before any rent became due, and that the rule above

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distress Hawkins' title had expired, and the plaintiff did not hold as his tenant.[1]

Even where rent has been paid by mistake. Claridge v. Mackenzie [1842].

In the same way a tenant who has paid rent to a lessor by whom he was not originally let into possession (the tenant's possession being derived separately) is not estopped from shewing that the lessor's title has expired, although the tenant, in ignorance of this fact, may have entered into a parol agreement with the lessor and paid rent to him under such agreement. In *Claridge* v. *Mackenzie*[2] the tenant brought an action of trespass for distresses levied under the above circumstances; it was held that such an agreement did not constitute a new letting into possession, and the plaintiff was at liberty to shew that the defendant had at one time a good title which had since expired.

Reason for the rule. The tenant is liable to the person who has the real title.

In *Mountnoy* v. *Collier*,[3] Erle, J., states the reason for the rule: "There are numerous authorities to shew that a tenant is not estopped from shewing that his landlord's title has expired,[4] and justice requires that he should be permitted to do so: for a tenant is liable to the person who has the real title, and may be forced to pay him, either in an action for use and occupation, if there has been a fresh demise or an arrangement equivalent to one, or in trespass for the mesne profits. It would be unjust if, being so liable, he could not shew that as a defence."

Estoppel operates only during the continuance of the tenancy.

Ammu v. *Ramakishna Sastri*[5] was a suit by the son of a mortgagor praying for redemption. The defendants were the heir of the mortgagee and two persons holding as tenants under a settlement made by Government of its waste land. As regards the tenants it was held that, inasmuch as their tenancy under the mortgagee (and therefore under the mortgagor) had been determined by the action of the Collector, these defendants were not estopped from shewing that, for more than twelve years before

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adverted to could not apply to the case where a tenant had been actually turned out of possession, and kept out a considerable time, and afterwards entered under a new agreement *bonâ fide* entered into with a different person."

[1] See also *Neave* v. *Moss*, 1 Bing., 360 [1823]; *England d. Syburn* v. *Slade*, 4 T. R., 682 [1792]; *Gravenor* v. *Woodhouse*, 1 Bing., 38 [1822].

[2] 4 M. & Gr., 143 [1842].

[3] 1 El. & Bl., 630 (640) [1853].

[4] See *England d. Syburn* v. *Slade*, 4 T. R., 682 [1792], where the term of the lease under which the plaintiff claimed had expired. *Doe d. Marriott* v. *Edwards*, 5 B. & Ad., 1065 [1834], where the landlord had conveyed the premises away.

[5] I. L. R., 2 Mad., 226 [1879].

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suit, they had held their plots from Government by a title adverse to the plaintiffs, and that as against them the suit was barred by limitation. The Madras Court point out that Section 116 of the Evidence Act operates as an estoppel only during the continuance of the tenancy. The tenancy under which these defendants held was determined when the Collector declared the land to be the property of Government, and granted it to them as raiyats of Government, and thereafter it was open to them to contend that the interest of their former landlord had expired. In *Subbaraya* v. *Krishnappa*[1] the same principle was applied in the case of the assignee of a sub-tenant who had obtained a pottah from the revenue authorities.

Estoppel against landlord inducing his tenant to attorn to another.

An extreme application of the rule that a tenant may rely on his landlord's title having expired occurred in *Downs* v. *Cooper*.[2] George Cooper, who claimed property under a will, put Downs into possession of it as his tenant and received rent from him. Thomas Cooper disputed his brother's title, and it was agreed between the brothers to refer the question to a barrister, who decided in favour of Thomas. George then delivered up the title-deeds, and permitted Thomas Cooper's attorney to communicate the transaction to Downs, who forthwith paid rent to Thomas. Subsequently George distrained for the rent. The Court of Queen's Bench held that George Cooper's title as landlord had expired; that his conduct was a direct admission of that fact; and that the case came strictly within the rule that a tenant, though not permitted to deny the right to demise, may allege that that right has expired. Lord Denman, C.J., went somewhat further: "It appeared to me," said the Chief Justice, "that if a tenant is estopped from denying the title of the landlord who gives him possession, the landlord must also be estopped from treating, as his tenant, him whom he has required to enter into that relation with another instead of himself."

Tenancy determined by estoppel.

Whether such a case as the above amounts to an admission only, or to an estoppel, is a question of degree, the principle being precisely the same; but it is conceived that, under certain circumstances, a landlord may by his conduct in causing the tenant to attorn to another terminate by estoppel the relation

[1] I. L. R., 12 Mad., 422 [1888].

[2] 2 Q. B. (A. & E)., 256 [1841].

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which exists between the tenant and himself. The more familiar instance of estoppel on the landlord will be examined below.[1]

Surrender by operation of law.

Where a tenant, while in occupation of land, takes a new lease from the same landlord, there is a surrender by operation of law, and the tenant is estopped from denying his landlord's title, the relation of landord and tenant being created afresh.

Lyon v. Reed [1844].

The term 'surrender by operation of law' is defined in *Lyon* v. *Reed*,[2] as applying to "cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist." Such an act is treated as amounting to a surrender. Baron Parke puts the case where a lessee for years has accepted a new lease from his lessor. The lessee is estopped from saying that his lessor had no power to make the new lease, the acceptance of the new lease being of itself a surrender of the former. Baron Parke proceeds to observe that the surrender is not the result of *intention*, but proceeds from the act being one of those which anciently were acts of notoriety not less solemn than the execution of a deed. There has been much conflict as to whether a surrender by operation of law takes place where the landlord enters himself by agreement with the tenant,[3] and where a third person is introduced as tenant by agreement.[4] Implied surrender is, however, expressly recognised in the Transfer of Property Act[5] as one of the modes by which a lease of immoveable property determines, and it is conceived that, in this country, what may amount to a surrender will always be a question of intention, and that the ordinary rules of estoppel by conduct will apply, the question being one of fact, whether the relation of landlord and tenant has been created or not.[6]

Implied surrender.

Estoppel by payment of rent.

To pass to the estoppel by payment of rent.[7] Payment of rent is evidence of permissive occupation, and in all cases furnishes a

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[1] See *infra* p. 104. Landlord's Estoppel.

[2] 13 M. & W., 285 [1844].

[3] See *Grimman* v. *Legge*, 8 B. & C., 324 [1828].

[4] *Nickells* v. *Atherstone*, L. R., 10 Q. B., 944 [1847].

[5] IV of 1882, s. 111 (*e*) & (*f*).

[6] The questions arising out of *Lyon* v. *Reed*, are elaborately discussed in the notes to the *Duchess of Kingston's case*, 2 Sm. L. Ca., 9th ed., 917—926.

[7] The reason for the rule is well put by Park, J. in *Gravenor* v. *Woodhouse* [1 Bing., 42 (1822)]: "Although on the one hand the general rule is most wise and politic in not allowing a tenant lightly to use to his land-

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strong presumption against the tenant. It furnishes the landlord with a *primâ facie* case, but the circumstance is always open to explanation; and where rent has been paid under a mistake or upon a misrepresentation, it is open to the tenant to rebut the presumption.[1] It is necessary, however, for the tenant to make out a strong case.[2]

Payment must have been made as for rent due without misrepresentation and under no mistake.

The limits of the rule are well stated by Lord Cranworth in *Attorney-General* v. *Stephens*.[3] In order to make the payment of rent operate as an estoppel, it is essential to make out that the payments have been made as for rent due in respect of land held as a tenant—*quicquid solvitur, solvitur secundum animum solventis*; "and if, on looking to the facts it is plain that the payments have been made (*secundum animum solventium*) not for rent, but on another account, the doctrine of estoppel arising from payment of rent has no place."

Where the tenant has, by the direction of his landlord, paid rent to a third person, the landlord is estopped from recovering so much of the rent as the tenant has paid, or made himself liable to pay, in consequence of that representation.[4]

Unexplained payment of rent.

Where rent is not shewn to have been paid under any mistake, that circumstance alone has been held to amount to an estoppel. In *Vasudev Daji Babaji Ranu*,[5] the plaintiff sued in ejectment alleging that his agent had let to the defendant for three years, and that the defendant was holding over and refused to vacate, and that judgment had been recovered for rent in respect of the same piece of land by the plaintiff's agent. The defendant's case was that the land had been mortgaged to the plaintiff's father and subsequently released, but he admitted the payment of rent since the judgment. Both the lower Courts found the lease to be a

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lord's detriment that title the possession of which he has entrusted to him, so, on the other, it is most just so far to guard the tenant, that he may not be carelessly put into the hazardous situation of paying his rent twice over, and being put to the trouble and expense of an action to recover that which he may have been compelled to pay."

In *Pitamberdas* v. *Jambusar*, I. L. R., 17 Bom., 510 [1892], it was held that the payment of a municipal tax for one year without protest did not create any estoppel in a suit to recover a sum paid in a subsequen year under protest, since the levy of each year's tax creates a separate cause of action.

[1] *Grarenor* v. *Woodhouse*, 1 Bing., 38 (42) [1822]; *Rogers* v. *Pitcher*, 6 Taunt, 202 [1815].

[2] *Rogers* v. *Pitcher*, *per* Chambre, J., at p. 209.

[3] 6 De G., M. & G., 111 (136) [1855].

[4] *White* v. *Greenish*, 11 C. B., N. S., 209 [1861]. As to conduct not sufficient to bar a landlord's legal rights where no question of limitation arises, see *Rambhat* v. *Bababhat* I. L. R., 18 Bom., 250 [1893].

[5] 8 Bom. H. C. (A. C), 175 [1871].

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forgery, and the defendant was not represented in special appeal. The High Court decreed the appeal observing: "In regard to the existence of a tenancy, we find that not only was a decree for rent made and enforced against the defendant in 1863, but in his deposition given in the present suit in 1868, the defendant admits that he has ever since paid rent regularly to the plaintiff, and he offers no explanation whatever of his having done so. Without deciding positively what may be the legal effect of the Mamlatdar's decision, we think that the defendant is concluded by the unexplained payment of rent from disputing the plaintiff's title in the present suit: *Cooper* v. *Blandy*,[1] *Doe d. Marlow* v. *Wiggins*.[2] The defendant must give up possession to the plaintiff, and then, if he has any title *aliunde*, that title may be tried in a suit of ejectment brought by him against the present plaintiff: *Doe d. Knight* v. *Lady Smythe*."[3]

Exception. Fraud or misrepresentation on the part of the landlord or mistake on the part of the tenant may displace the estoppel.

In the above case it is conceived no estoppel would have arisen had the tenant shewn that the payments were made by mistake founded upon fraud of the plaintiff. In *Doe d. Marlow* v. *Wiggins*,[4] Lord Denman, C.J., observed: "Thompson having possession under the testator, the lessor of the plaintiff comes in and claims to be devisee. Thompson admits him to be so, and the admission is acted upon. Afterwards it is contended that the will is a nullity. A case may indeed be supposed where evidence of this kind might be admissible; as if it appeared that the party claiming as devisee had been guilty of a *fraud* in the making of a will and *in falsely representing* it to the tenant as a valid one. I can conceive that, under such circumstances, evidence of the fraud in respect of the will might properly form part of the tenant's case But no such evidence is offered here. The only attempt was to prove that the will in question was legally no will." And Patteson, J., added: "As to the estoppel, there was no mistake of facts in this case. Thompson was devisee, whether the will were sustained or not. If he had represented himself to the tenant as devisee, and another person had really been so, there would have been a *misrepresentation*, and the tenant would not have been bound."

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[1] 1 Bing., N C., 45 [1834].
[2] 4 Q. B., 367 [1843].
[3] 4 M. & S., 347 [1815].
[4] 4 Q. B., 367 [1843].

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In *Cooper* v. *Blandy*,[1] Cooper came into possession under Perry and Nightingale who had paid rent under distress to Blandy. Blandy put in evidence a lease shewing that he had no title to distrain, and the plaintiff sought to avail himself of this evidence. It was held that he could not. "As a general rule," said Bosanquet, J., "it is not competent to a tenant, after submitting to a distress or payment of rent, to dispute his landlord's title. There are exceptions to that rule, but this is not one of them. It is not the case where a paramount title has been established; the landlord's title has not expired; nor has there been any payment by *mistake*. It is nothing more than the case of a tenant picking a hole in the title of a person to whom his predecessors have paid rent without objection."

Tenant may shew payment of rent to representative by mistake.

So where a tenant has paid rent under a mistake to a person professing to claim under his original lessor, the tenant may call upon the person claiming the land to prove his title, and he will not be precluded from so doing by the payment of rent or other acts which might, under some circumstances, amount to an estoppel.[2] The estoppel may be displaced not merely by actual misrepresentation on the part of the landlord, but by the tenant's mistake or misapprehension proceeding from his ignorance of the title of the party claiming the rent.[3] The tenant may explain and render inconclusive acts done through mistake or misapprehension.[4]

Banee Madhub Ghose *v.* Thakur Doss Mundul [1866].

The above exception is illustrated in the case of *Banee Madhub Ghose* v. *Thakur Doss Mundul*.[5] The plaintiff sued as putnidar of certain property granted to him by the widow of one of four brothers. The tenant denied the widow's right to grant a putni, and stated that the whole rent had always been paid to the kurta of the family, who intervened and produced the will of Sreekissen which showed that his widow had no power of alienation. Sir Barnes Peacock, in delivering the judgment of the Full Bench, observed: "According to English law if a man takes land from another as his tenant he is estopped from denying the title of that

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[1] 1 Bing. N. C., 45 [1834].

[2] *Jew* v. *Wood*, 1 Cr & Ph., 185 (194) [1841].

[3] *Jew* v. *Wood*; *Rogers* v. *Pitcher*, 6 Taunt., 202 [1815]; *Fenner* v. *Duplock*, 2 Bing, 10 [1824]; *Gregory* v. *Doidge*, 3 Bing., 474 [1826].

[4] *Doe d. Plevin* v. *Brown*, 7 Ad. & E., 447 (450) [1837]. *per* Lord Denman, C.J.

[5] B. L. R., Sup. Vol., 588 (F. B.) [1866].

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person. But if he takes land from one person and afterwards pays rent to another, believing that other to be the representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took ; for example, if a man pays rent to another believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law, or that the landlord left a will ; the tenant, in a suit for subsequent arrears of rent, would not be estopped from shewing that he paid the former arrear under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *primâ facie* evidence. It is, like all *primâ facie* evidence, liable to be rebutted, and the tenant is not estopped from rebutting it if he can. Therefore even if it has been proved that the widow in this case, after her husband's death, received one-fourth of the rent, that would not estop the tenant from afterwards proving that the husband had left a will by which he had devised his share of the estate to other persons in trust to apply a portion of the rents in a particular manner and to pay over the residue to his widow."

Payment of quit-rent.

So the payment for some years by tenants of a quit-rent levied from their landlord by the Government does not estop the former when better informed of their rights from contesting the title of the latter. In *Jesingbhai* v. *Hataji*,[1] the ancestors of the defendants, finding themselves unable to meet the expenses attaching to a village, relinquished it to the ancestors of the plaintiffs, on condition of their being allowed to retain a third of the lands rent-free as their *vánta* or share subject to no other condition than a house-tax. It was held that no relation of landlord and tenant was created thereby between the parties, and the fact that the defendants had made several payments on account of quit-rent to the plaintiffs, did not estop the defendants from refusing to pay further, or from asking the Government to grant a *sanad* to them in respect of the land in their possession.

[1] I. L. R., 4 Bom., 79 [1879].

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Where, however, rent was not shewn to have been paid, and the plaintiff relied upon an application by the defendant to the Collector for a tenure offering to pay rent for the same, and it appeared that the Government were not in a position to grant the tenure, it was held that the defendant was in no way bound by an offer made under the impression that the power of creation was with the Government, and that no question of estoppel arose.[1] Offer to pay rent.

In *Fenner* v. *Duplock*,[2] the lessee continued to pay rent to his lessor after the title of the latter had expired, in ignorance of the nature of the lessor's title. "Although," said Best, C.J., "a tenant may shew that his landlord's title has expired, yet if he enters on a new tenancy he shall be bound; but before he can be so bound, it must appear that he was acquainted with all the circumstances of the landlord's title; the landlord before he enters into any new contract must say openly, 'My former title is at an end; will you, notwithstanding, go on?' The defendant in the present case knew that his title was at an end; was it honest in him to persist in his claim, and to call for rent under such circumstances? . . . Payment of rent may indeed be evidence of an attornment; but before we can decide whether an attornment took place, we must look at the circumstances and see whether they do not rebut the presumption of an attornment." Presumption of attornment may be rebutted.

The next case to be examined is where the tenant has come into possession under a former owner. In such a case the tenant does not attempt to question the title under which he received possession. The rule, therefore, which permits the tenant to shew that he has acted under a mistake is only an apparent exception to the general rule which precludes him from denying his lessor's title. The tenant may shew that he has derived possession from a former owner.

This proposition is illustrated by the case of *Cornish* v. *Searell*.[3] The defendant in that case, being tenant of premises under a lease from his father, agreed to attorn to the plaintiffs, but his lease was never surrendered, and he was still liable by law to pay rent to his lessor and to perform the covenants. "It has been said," observed Bayley, J., "that the defendant, having Cornish *v.* Searell [1828].

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[1] *Brijonath Chowdhry* v. *Lall Meah Munneepooree*, 14 W. R., 391 [1870].

[2] 2 Bing., 10 [1824].

[3] 8 B. & C., 471 [1828]. See *The Collector of Allahabad* v. *Suraj Baksh*, 6 N.-W. P. H. C. R., 333 [1874].

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agreed to become tenant to the plaintiffs, cannot dispute their title. If the defendant had received possession from them, he could not have disputed their title. In *Rogers* v. *Pitcher*[1] and *Gravenor* v. *Woodhouse*[2] the distinction is pointed out between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned, through mistake, to one who has no title. In the former case the tenant cannot (except under very special circumstances) dispute the title: in the latter he may." The lease being an existing lease was an answer to the action, inasmuch as it thereby appeared that the title to receive the rent was in a third person.

And in such a case may deny derivative title of landlord.

A tenant already in possession may shew that his landlord has no derivative title from the person through whom he professes to derive his title. In *Doe d. Higginbotham* v. *Barton*[3] one Morton, being seised in fee of the premises, mortgaged them to one Woodhead in 1821, and remained in possession. In 1829 Morton mortgaged the same premises to the lessor of the plaintiff Higginbotham, having previously to that date demised a portion of the premises to Barton. Subsequently to 1829, Higginbotham received rent from Barton, and demised the remainder of the premises to a person through whom the other defendant, Warburton, claimed. In 1835, Woodhead gave notice to the defendants to pay rent to him, and received the rents accordingly. Higginbotham afterwards served the defendants with notices to quit, and brought an action of ejectment. It was argued that the defendants could not set up the prior mortgage, because the effect of such a defence would be to deny that Morton and his assignee had a right to demise, and that this evidence should be excluded. The defendants contended that the mortgage to Woodhead and the payment of rent to him did not amount to disputing that the lessor of the plaintiff ever had title, but, on the contrary, shewed that he had a defeasible title, and that his title had been defeated.

Doe d. Higginbotham *v.* Barton [1840].

Lord Denman, in delivering the judgment of the Court of King's Bench, observed: "Supposing the facts to be as above stated, it is clear that the lessor of the plaintiff never had any

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[1] 6 Taunt., 202 [1815].
[2] 1 Bing., 38 [1822].
[3] 11 Ad. & E., 307 [1840].

legal estate ; and he must rely on the rule with regard to landlord and tenant. That rule is fully established, *viz.*, that the tenant cannot deny that the person, by whom he was let into possession, had title at that time, but he may shew that such title is determined—*Doe d. Knight* v. *Lady Smythe*.[1] With respect to the title of a person to whom the tenant has paid rent, but by whom he was not let into possession, he is not concluded by such payment of rent if he can shew that it was paid under a mistake. . . . The tenant, therefore, may be said to satisfy the rule when he admits that, at the time when he was let into possession, the person who so let him in was mortgagor in possession, not treated as trespasser, and so had title to confer on him, the tenant, legal possession ; and yet may go on to shew that subsequently he has been treated as a trespasser, whereby his (the mortgagor's) title and the tenant's rightful possession under him, have been determined." The Court accordingly made the rule absolute for a new trial on the ground that the evidence excluded might have shewn that Woodhead had treated the lessor of the plaintiff as a trespasser.[2]

Rule recognised in this country.

The rule that a tenant already in possession, who has executed a kabuliyat in favour of, and paid rent to, one who claims under a derivative title from the last owner, is not estopped from setting up another title was recognised in the case of *Lal Mahomed* v. *Kallanus*.[3] The plaintiff claimed under an ijara pottah, and stated that the defendant had executed a kabuliyat in his favour and had paid rent to him. The defendant admitted the payment of rent, but alleged that the kabuliyat had been obtained by coercion. The defendant in special appeal contended, upon the authority of *Lodai Mollah* v. *Kally Dass Roy*,[4] that he was entitled to prove the title of the persons set up by him, notwithstanding the execution of the kabuliyat in favour of the plaintiff who

Lal Mahomed *v.* Kallanus [1885].

[1] 4 M. & S., 347 [1815].

[2] Upon this point the Chief Justice said : "It is conceded on all hands that when a lease is made by the mortgagor subsequently to the mortgage, and the mortgagee afterwards requires the rent to be paid to him, and it is paid accordingly, as here, the relation of landlord and tenant may arise between the parties. Or, at all events, the mortgagee may be entitled to sue the tenant for use and occupation. Therefore, under the circumstances of this case, it is plain that Woodhead was entitled to the profits of the land, and the defendants were right in paying him those profits whether strictly called rent or not."

[3] I. L. R., 11 Calc., 519 [1885].

[4] I. L. R., 8 Calc., 238 [1881].

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claimed under a derivative title. For the plaintiff it was urged that the doctrine of estoppel should not be confined to cases between the tenant and the person who has let him into possession, and that Section 116 operated as a bar. The defendant in reply relied upon *Cornish* v. *Searell*[1] as being in point, and contended that there is no estoppel against disputing a derivative title; that a tenant is at liberty to admit derivation of title, and set up the fact that the landlord's title is forfeited to another. The defendant's argument prevailed, the Court[2] holding that the words, "at the beginning of the tenancy" in Section 116, only apply to cases in which the tenants are put into possession of the tenancy by the person to whom they have attorned, and not to a case where the tenants have previously been in possession.[3]

Tenant may shew affirmative title in himself.

The case of *Ford* v. *Ager*[4] is an authority that a tenant may, without disputing the title of his landlord, shew an affirmative title in himself from which any title the landlord had was derived. That was an ejectment for a cottage and garden. The owner in fee, Robert Ford, put his illegitimate son Quinton into possession, and afterwards mortgaged the premises. Quinton, having remained in possession for many years without paying rent or acknowledging his father's title, conveyed in fee to the plaintiff, and after attorning to him as his tenant, gave up possession to the representative of the mortgagor and the executor of the mortgagee (whose mortgage had been kept alive by payment of interest), and they conveyed their interests to the defendants. A verdict being entered for the plaintiff, a rule for a non-suit was obtained, when it was contended that the defendants were estopped from denying the plaintiff's title until they restored possession of the land.[5] The Court of Exchequer[6] held that the

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[1] 8 B. C., 471 [1828].

[2] *McDonell* v. *Macpherson, J.J.*

[3] "It cannot be said that there was any such contract between the parties as would estop the defendant from denying the plaintiff's title, inasmuch as no consideration was given. Had the plaintiff inducted the defendant into possession, the giving of the possession would have been the consideration; but the defendant was in possession before, and all that he did was to give a kabuliyat to a person claiming a derivative title from the last owner. This title the defendant now wishes to dispute, and we think that he is entitled to." *Per Cur.*, p. 523, 4.

[4] 2 H. & C., 279 [1863].

[5] See *Doe d. Bullen* v. *Mills*, 2 A & E., 17 [1834]; *Doe d. Johnson* v. *Baytup*, 3 A. & E., 188 [1835]; *Bayley* v. *Bradley*, 5 C. B., 396 (400) [1848].

[6] Pollock, C. B, Channell and Bramwell, B B.

objection, that before any question of title was gone into, the defendants must restore possession, had not been sustained, and that upon the merits the plaintiff had no title against those claiming under the mortgagee. Channell, B., observed : " I do not dispute the authority of *Doe d. Bullen* v. *Mills* [1] ; but the present case appears to me distinguishable. Although up to a certain point it resembles that case in its facts, it differs in the circumstances under which the plaintiff's tenant was originally let into possession. The defendauts do not seek to dispute the plaintiff's title ,but to shew an affirmative title in themselves, from which any title the plaintiff had was derived."

Benami title of landlord may be shewn : Donzelle *v.* Kedarnath Chuckerbutty [1871].

In this country the doctrine that a tenant may explain the benami title of his landlord has been allowed to vary the rule that a lessee may not question his lessor's title. In the case of *Donzelle* v. *Kedarnath Chuckerbutty* [2] the plaintiff sued, as the putnidar of one Anusul Burkut under a kabuliyat granted by the defendant in her favour, to recover arrears of rent. The defendant pleaded that Golam Hossein, the husband of Anusul Burkut, was in his lifetime the real owner of the property, and that Anusul Burkut was a mere benamidar for him ; that, after his death, quarrels had arisen between Anusul Burkut and her co-widow who had taken possession of fifteen annas of the property, and from whom the defendant had since taken a putni. The defendant only admitted Anusul to be the proprietress of a one-anna share under the Mahomedan Law, and prayed that she might be allowed to explain the real nature of the lease under which the plaintiff claimed.

The lower Courts declined to go behind the kabuliyat, and examine the real state of the title, upon the principle of estoppel. The defendant appealed on the ground that the question as to who the real owner was had never been tried. The case was fully argued, and the arguments are instructive. For the respondent it was contended that a tenant could not be allowed to adduce parol evidence to contradict the title of his lessor admitted by a written document. The judgment of Paul, J., deals chiefly with this aspect of the case and will require to be noticed

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[1] 2 Ad. & E., 17 [1834].
[2] 7 B. L. R., 720 ; 20 W. R., 235 [1871].

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in a subsequent [1] chapter. That of Bayley, J., which bears upon the present subject, states with great clearness the grounds of the decision.

There is no contract between the benamidar or the tenant.

The principle upon which the decision proceeded is that the tenant, having paid rent to a benamidar under a mistake as to the true state of the title, and being in fact liable to pay rent to the real owner, may be permitted to shew the truth.

Tenant may not set up benami title against landlord.

A tenant will not be permitted, however, to pick a hole in the landlord's title where he has acknowledged him as such under no misapprehension as to his real rights. This is shewn by the case of *Sabuktulla* v. *Hari* [2] where the plaintiff sued to recover possession of certain buildings and land in respect of which the defendant had for several years paid rent. The defendant set up a prior benami conveyance as justifying his possession. It was found that the plaintiff's father, with a view to preserving the property from attachment, had conveyed it to the defendant for a nominal consideration, the defendant remaining in possession and paying rent. The defendant claimed that the plaintiff was estopped from shewing the conveyance to be a nullity, but the Court refused to entertain this contention, holding that the relationship of landlord and tenant existed between the parties.[3]

Landlord's estoppel, a branch of title by estoppel.

The estoppel against a LANDLORD is a branch of title by estoppel and is of this nature.[4] When the grantor, by a recital, or by an

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[1] Part I, Chapter X.

[2] 10 C. L. R., 199 [1882].

[3] "The case is that of a tenant who, having got possession of the holding as a tenant and having paid rent for several years refuses to continue to pay rent and sets up a benami deed by which, before the commencement of the tenancy, the plaintiff's father had purported to convey the leased premises to the tenant. We think that, under these circumstances, the plaintiff is entitled to recover. He sues on his lease; when the conveyance is found to be a mere colourable transaction, the defendant shifts his ground and claims that the plaintiff is precluded from shewing it to be a nullity. This is a state of things quite different from those cases in which money has passed under a fraudulent transaction, and one party to the fraud seeks to recover it. Here the defendant being in as a tenant fraudulently sets up a benami deed, first as being *bonâ fide*, and for valuable consideration, next as estopping the plaintiff from asserting the tenancy. This, in our opinion, he is not entitled to do." *Per Cur.*, at p. 200.

[4] Bigelow on Estoppel, 5th ed., 390. See *Trivivan* v. *Lawrence*, 2 Sm. L. Ca., 9th ed., at p. 828. "As if a man makes a lease by indenture of D, in which he hath nothing, and after purchases D in fee, and after bargains and sells it to A and his heirs, A shall be bound by the estoppel; and that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes, and an ejectment is maintainable upon the mere estoppel;" also Williams' Saunders (1871), 830, in the notes to *Walton* v. *Waterhouse*; also *Webb* v. *Austin*, 7 Man. & Gr., 701 (724) [1844], where the lessor

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intention to be gathered from the scope and object of an instrument, or by any other circumstances reasonably to be inferred, is shewn to have stated that he is seised of a specific estate, and the Court finds that the parties proceeded upon the assumption that such an estate was to pass, an estate by estoppel is created between the parties and those claiming under them, in respect of any after-acquired interest of the grantor, the newly acquired title being said to 'feed the estoppel.' The principle is that one, who has permitted another to act upon the belief that he possesses a specific title or interest, shall not afterwards be heard to say that he had no such interest; and the after-acquired title enures for the benefit of the grantee.

Estate by estoppel.

But few illustrations of this well-known doctrine are to be found among the Indian cases. The facts in *Kurn Chowbey* v. *Jankee Pershad*[1] were as follows: One Akbar Ali, who farmed a mouzah in *mustagiri*, granted to the Rajah of Huldee sub-leases to subsist so long as he paid a certain annual rent. The Rajah held the lands in *mustagiri* during his life, and in 1835 the manager of his estates leased the lands by certain deeds to the defendant's ancestor in perpetuity. In 1840 Government conferred proprietary rights on the then Rajah subject to the *mustagiri* of Akbar, and in 1841 the plaintiff's ancestor's name and the terms of the above deeds were recorded in the settlement papers. In 1854 the plaintiff purchased at auction the rights of the Rajah acquired under the settlement in 1841, but the rights of the Rajah as sub-lessee were not sold. Akbar subsequently put an end to the Rajah's sub-lease for non-payment of rent and sub-leased to the plaintiff, and in 1862 surrendered his *mustagiri*, whereupon the plaintiff sued to have the leases of 1835 set aside. It was held that when the Rajah in 1840 acquired proprietary rights from Government sufficient to support the grant professed to be made to the defendant's ancestor in 1835, that grant would enure for the benefit of the defendant; the Rajah and the plaintiff who derived his title under him being estopped from denying the title conferred on the

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• had mortgaged the premises previous to the lease, but the mortgagees being willing to make a good title to the purchaser, it was held by Tindal, C. J., that the lease though originally a lease by estoppel, was convertible into a lease in interest by the concurrence of the mortgagees; also Bacon's Abridgement, Leases (O).

[1] 1 Agra (N.-W. P.), 164 [1866]. Turner and Spankie, JJ.

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defendant by the deeds of 1835. Similarly, in *Kazee Abdool Mannah* v. *Buroda Kant Banerjee*,[1] the lessors of the defendant's vendor granted a mokurraree pottah at a time when they held the property under a temporary settlement, but subsequently obtained from Government permanent rights. It was held that they could not question the validity of the pottah previously granted by them.

The rule is, however, embodied in Section 43 of the Transfer of Property Act,[2] and in Section 18 of the Specific Relief Act.[3]

Other estoppels against the landlord.

Where a landlord has allowed his tenants to erect buildings in the hope or encouragement that they will obtain an extended term or an allowance for the expenditure, an estoppel may be raised in favour of the tenants, and the landlord may be precluded from saying that he did not excite such an expectation, upon the principle laid down by Lord Kingsdown in *Ramsden* v. *Dyson*.[4] It must, however, be clear that the tenants were induced to expend their money by reason of something very nearly amounting to an agreement or license on the part of the landlord[5] before the erection, or a distinct acquiescence immediately after it. It will be for them to prove by strong and cogent evidence, leaving no reasonable doubt, that they acted upon encouragement.[6] Where, in a suit for ejectment, there was no evidence that tenants had entered on the land for building purposes, or had been encouraged by the landlord to build, it was held that the former had no equity as against the latter.[7] In a recent Madras case it was held, upon a finding that the landlord had stood by while the character of the holding was being altered, and had thereby caused a belief that the change had his approval, that the tenant was entitled

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[1] 15 W. R., 394 [1871], Ainslie and Paul, JJ.

[2] Act IV of 1882. Previous to that enactment it was held that the rule does not apply to a compulsory sale made through the Court at the instance of an execution-creditor — *Alukmonee Dubee* v. *Baney Madhub Chuckerbutty*, I. L. R., 4 Calc., 677 [1878]. That, however, was not a case of landlord and tenant. See Part I, Chapter X.

[3] Act I of 1877.

[4] L. R., 1 E. & I. A., 129 (170) [1866]. See *Gregory* v. *Mighell*, 18 Ves., 328 [811].

[5] *Pilling* v. *Armitage*, 12 Ves., 78 [1806]; *Ramsden* v. *Dyson*, at p. 170. See *Mold* v. *Wheatcroft*, 27 Beav., 520 [1859]; *Plimmer* v. *Mayor of Darlington*, L. R, 9 Ap. Cas., 699 (711); and see *Yeshwadabai* v. *Ramchandra Tukaram*, I. L. R, 18 Bom, 66 (78—82) [1893], and cases there cited.

[6] See *Dunn* v. *Spurrier*, 7 Ves., 236 [1802].

[7] *Onkarara* v. *Subaji Pandurang*, I.L.R., 15 Bom., 71 [1890].

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to compensation for his improvements.[1] It is conceived that the conduct of the landlord must be such as "really to induce the person committing the act, and who might have otherwise abstained from it, to believe that he assents to its being committed."[2]

So where a landlord did not object to buildings erected by his tenant for a period of twenty-five years and received rent during that time, it was held that even if it was not shewn that the land was originally granted for building purposes, the landlord would be precluded from ejecting the tenant without compensation.[3]

In any event where a person is in possession of land under any *bonâ fide* claim of title and erects buildings thereon, he is entitled either to remove the materials, or to obtain compensation for their value in case the owner of the soil desires the building to remain for his benefit.[4]

Representations by lessor a ground for refusing specific performance.

In *Piggott* v. *Stratton*[5] a party was induced to take a sub-lease of land commanding a sea view for building purposes on the faith of a representation made by his lessor Stratton that the lease under which he himself held (which was the fact) bound him not to build so as to obstruct the sea view. Stratton having received the price of the land enhanced by the security of the sea view, allowed the sub-lessee to erect houses on the land sub-let, and then surrendered his original lease and took one not containing the

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[1] *Kunhammed* v. *Narayanan Mussad*, I. L. R., 12 Mad., 320 [1888]; and see *Ravi Vurma* v. *Mathissen* in note at p. 323.

[2] *De Bussche* v. *Alt*, L. R., 8 Ch. D., 286; *Uda Begum* v. *Imamud-din*, I. L. R., 1 All., 82 [1875], where delay on the part of the landlord was held not to deprive her of her right to relief. See *Shibdass Bandapadhya* v. *Bamandass Mukhapadhya*, 8 B. L. R., 237 (242) [1871]; *Baney Madhab Banerjee* v. *Jai Krishna Mookerjee*, 7 B. L. R., 152 (158) [1869]; *Durga Prashad Misser* v. *Brindaban Sookul*, ib., 159. In *Bisheshar* v. *Muirhead*, I. L. R., 14 All., 362 [1892], the same principle was applied in the case of a permanent lessee of agricultural land who commenced to build upon land in the possession of an occupancy tenant. It was held that the lessee was affected with notice of the plaintiff's title, and could not avail himself of the doctrine of acquiescence.

[3] *Yeswadabai* v. *Ramchandra Tukaram*, I. R., 18 Bom. 66 [1893], and cases there cited; *Dattatraya* v. *Shridhar Narayan*, I. L. R., 17 Bom., 736 [1892].

[4] *In the matter of Thakoor Chunder Poramanick*, B. L. R., Sup. Vol., 595 [1866]. Act XI of 1855, s. 4, which applies only to cases under English law, secures to *bonâ-fide* holders under defective titles the value of buildings erected or improvements made by them in the belief that they had an estate in fee simple or other estate, and that Act has by Act XV of 1874, s. 3, been extended to the whole of British India except the Scheduled Districts. See also Act IV of 1882, s. 108 (*h*).

[5] 1 DeG. F. & J., 33 [1868]. See *Martin* v. *Douglas*, 16 W. R. (Eng.), 268 [1868], distinguishing this case from those case where puffing representations are made enhancing the value of property to be sold.

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old restrictions. It was held that the plaintiff was entitled to an injunction upon equitable grounds, since what the defendant had said to his sub-lessee amounted to a representation that he, the defendant, could not during his lease build otherwise than in a particular way. And where a lessor or vendor has represented that he will do something for the lessee's, or purchaser's benefit upon the property itself, or upon adjoining property, this may be ground for refusing specific preformance of the contract at the suit of the former, "the conduct of the party applying for relief being an important element for consideration."[1] These appear to be cases of estoppel though not expressly decided as such.

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[1] *Lamare* v. *Dixon*, L. R., 6 H. L., 414 (420) [1872]. See *Beaumont* v. *Duke*, Ja., 422 [1821]; *Pennock* v. *Pearson*, 11 Beav., 335 [1848]; *Myers* v. *Watson*, 1 Sim. (N. S.), 523 [1851]; *Flight* v. *Barton*, 3 My. & K., 282 [1832].

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CHAPTER IV.

PATENTS.

Estoppel against licensee of patent, founded upon the contract for permissive enjoyment—Enjoyment by permission of the patentee is consideration—Licensee is bound to admit validity of patent—*Crossley* v. *Dixon* [1863]—The patentee contracts to put the licensee into the same position as himself—Contract for *exclusive* right may perhaps amount to warranty or raise estoppel—*Chanter* v. *Leese* [1838]; *Smith* v. *Scott* [1859]—The assignee of a patentee is not a mere licensee—*Walton* v. *Lavater* [1860]—Licensee may, however, shew limits of patent—*Clark* v. *Adie* [1877]—His position analogous to that of tenant—*In the matter of D. H. R. Moses* [1887]—Patentee may not derogate from his own grant—Estoppel against patentee considered in *Cropper* v. *Smith* [1884]—Conduct not amounting to abandonment of legal rights does not estop patentee: *Proctor* v. *Bennis* [1887]—Acquiescence—Those who infringe a patent act at their own peril—The rights of partners working a patent before and after dissolution—Third parties—Position of licensee of trade-mark—Estoppel against owner—*Lavergne* v. *Hooper* [1884.]

Estoppel against licensee of patent, founded upon the contract for permissive enjoyment.

THE position of a licensee who has contracted for the use of a patent[1] has next to be considered. Here the consideration for the promise to pay royalty is the permission to use the invention.[2] The patentee is unable to claim against the licensee for infringement because this is excluded by the fact of the license. It follows, therefore, that there is a contract between the owner of the patent and the licensee who is working the patent under his permission, similar to the contract between landlord and tenant, and the licensee is precluded from questioning the patentee's right. "Although," said Lord Blackburn in *Clark* v. *Adie*,[3] "a stranger might shew that the patent is as bad as any one could wish, the licensee must not shew that." "So far as he is concerned," observed Lord Cairns

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[1] The grant of letters patent for inventions is by virtue of the Crown's prerogative, and confers an exclusive right to the use of an invention against all the subjects of the Crown; but the Crown itself may use the invention without the assent of, or making compensation to, the inventor: *Feather Suppliant* v. *The Queen*, 6 B. & S., 257 [1865]; explained in *Dixon* v. *London Small Arms Co.*, L. R., 1 Ap. Ca., 632 [1876]. The Acts in India granting exclusive privileges to inventors are Act XV of 1859, Act XIII of 1872, Act XVI of 1883 and the Inventions and Designs Act (V of 1888) which repeals the previous Acts.

[2] *Per* Bramwell, J., in *Noton* v. *Brooks*, 7 H. & N., 504 [1861].

[3] L. R., 2 Ap. Ca., 436 [1877].

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in the same case, "he must stand here admitting the novelty of the invention, admitting its utility, and admitting the sufficiency of the specification."[1]

Enjoyment by permission of the patentee is consideration.

Where an invention has actually been used by the permission of the patentee the user amounts to consideration, although the patent may have been void. *Lawes* v. *Purser*[2] is a strong authority to this effect. The defendants agreed to pay 10*s.* per ton for a substance used in certain manure manufactured by them, the plaintiff being the patentee of an invention for the manufacture of the manure. Upon an action to recover the money so payable, the defendants pleaded the patent was void. The Court of Queen's Bench held that the defendant, having had the advantage of the contract, could not say that the patent was void, and force the plaintiff to try his right.[3]

Licensee is bound to admit validity of patent.

The licensee, therefore, cannot act under his license and at the same time repudiate it. He may give notice to determine the agreement, paying for such user as he has enjoyed, and use the invention at his own peril, but he will in that case be subject to an action for infringement.

Crossley v. Dixon [1863].

In *Crossley* v. *Dixon*[4] the licensee, a carpet manufacturer, agreed verbally with the owners of certain patents that machines, embodying their inventions, should be made under their superintendence

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[1] *Clark* v. *Adie*, 425. See *The Grover and Baker Sewing Machine Co.* v. *Millard*, 8 Jur. N. S., 713 [1862]; where Wood, V. C., held that the fact of a patent having been found invalid at law in an action between the patentee and a third party could not be set up against the patentee by his licensee in a suit upon the same patent.

[2] 6 E & B., 930 [1856]. See *Taylor* v. *Hare*, 1 New Rep., 260 [1865], *per* Mansfield, C.J.

[3] Erle, J., said: "It is my opinion that the defendants are bound by their promise, they having had the consideration they bargained for. The plaintiff was in possession of a patent right; the defendants promised to pay him for permission to use it; and they have had that permission. I am decidedly of opinion that, if the plaintiff had then known that the patent was void, this would prove fraud on his part; but this is not alleged. Then it is clear to me that, if the defendants go on under this agreement, using the patent right by the plaintiff's permission, they must pay him, whether the patent was valid or not, until at least, they give notice that they dispute the validity of the patent, and will, in future, use the invention in their own right, and not under the permission of the plaintiff. Such a notice would change the position of the parties: after it the patentee might sue the defendants for an infringement of his patent for any subsequent user; and, perhaps, in an action on the agreement for the price for such subsequent user, the invalidity of the patent might be a defence." In *Noton* v. *Brooks*, 7 H. & N., 499 [1861], Pollock, C. B., puts the case: "Supposing a person says to another, 'Let me use your right of way, and I will pay you sixpence every time I use it'; if he used it a hundred times could he refuse to pay because it turned out that there was no right of way?"

[4] 10 H. L. Cas., 293 [1863].

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for his own use. Dixon was afterwards supplied, by one Sharpe, with other machines which the patentees alleged to be infringements of their patents. In a suit by the patentees, Dixon, who was still paying royalties for the machines manufactured for him, denied the agreement and challenged the validity of the patents. Vice-Chancellor Hall having made a decree and directed an enquiry, the Lords Justices directed the appeal to stand over till the patentees had brought any action they might be advised to try the question of infringement. The House of Lords held that the verbal agreement must be treated as a license, that Dixon was bound to recognise and admit the validity of the patent right, and that there could be no reason for sending the appellants at large into a Court of law.[1] It was of course open to the respondent to put an end to the license which was the foundation of the suit, in which event the appellants could only bring an action against him for infringing their patent. But the contract being admitted and being free from fraud, the Court of Chancery could not abdicate its functions, but was bound to enforce the contract.

The patentee contracts to put the licensee into the same position as himself.

In all these cases the consideration for the promise to pay royalty is the permission to use the invention.[2] The licensee has contracted for the use of the patentee's right, such as it is, without regard to the fact whether it can be sustained upon litigation or not.[3] In *Hall* v. *Conder*[4] the plaintiff transferred to the defendants one half of certain foreign patents when the same should be obtained, and also a moiety of an English patent, upon the defendants agreeing to pay £2,500 and a proportion of the net profits. The defendants refused to perform the agreement, and pleaded that the invention was worthless. The Court of Common Pleas held that there was no express warranty, or its equivalent by declarations or conduct,

[1] "It is palpable," said Lord Westbury, by this bill, namely, an account of the royalties claimed by the appellants in respect of every machine used by the respondent, whencesoever derived, which embodies in it these inventions, in respect of which the agreement to pay royalty was originally made."—p. 306.

[2] *Per* Bramwell, B., in *Noton* v. *Brooks*, 7 H. & N., 504 [1861].

[3] *Per* Willes, J., in *Smith* v. *Neale*, 2 C. B. (N. S.) 89 [1857].

[4] 2 C. B. (N. S.) 22 [1857].

"that so long as the agreement made by the appellants with the respondent that the respondent shall be at liberty to use the inventions paying certain royalties, continued, there is no limit to the extent of the respondent's user, and it would therefore have been impossible for them to have brought an action of infringement against the respondent. There could be no infringement pending the license. The license continues, and the extent of the remedy, therefore, can only be that which is sought

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on the part of the vendor; the contract was not to sell a good and indefeasible patent right, but merely to place the defendants in the same position as the plaintiff held with reference to the alleged patent, and that, as regards the utility of the invention, the defendants had contracted upon their own judgment for the purchase of the patent, such as it was, having equal means with the plaintiff for ascertaining its value. If the licensee chooses to use the invention, he must pay the stipulated price.

Contract for exclusive right may perhaps amount to warranty or raise estoppel against patentee.

The contract between the parties may, it is conceived, be of a different nature. In *Chanter* v. *Leese*[1] the plaintiff contracted with the defendants, not under seal, that they were to have the *exclusive right* to use, manufacture, and sell certain patent inventions, paying an annual sum as consideration for the license. The defendants, in action upon the contract, pleaded that the invention was not a new one at the time of the agreement, as the plaintiff well knew, and raised other defences. It appeared also that the defendants had never accepted or enjoyed any part of the consideration. Lord Abinger, C.B., in delivering the judgment of the Court of Exchequer said: "The declaration is founded upon the contract and nothing but the contract. If a man contract to pay a sum of money in consideration that another has contracted to do certain things on his part, and it should turn out, before anything is done, that the latter was incapable of doing what he engaged to do, the contract is at an end." It would seem, however, that there must be either warranty, or something equivalent to estoppel by contract, on the part of the patentee, to raise a good defence on the part of the licensee.

Chanter v. Leese [1838].

Smith v. Scott [1859].

In *Smith* v. *Scott*,[2] a decision upon pleadings, the above case was distinguished upon the ground that the contract was not under seal in the earlier case. In *Smith* v. *Scott* the Court of Common Pleas held, upon the authority of *Hall* v. *Conder*;[3] *Smith* v. *Neale*;[4]

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[1] 4 M. & W., 295 [1838]; *Bowman* v. *Taylor*, 2 Ad. & E., 278 [1834], was a case of a license under seal, and the defendants were held estopped by the recital of the deed; *Hayne* v. *Maltby*, 3 T. R., 442 [1789], proceeds upon the ground of fraud, and is distinguished in *Bowman* v. *Taylor*. See also the observations of Lord Cottenham, L. C., *Neilson* v. *Fothergill*, Webster, 290 [1841] upon *Hayne* v. *Maltby*, and the abstract of cases upon estoppel and failure of consideration in the notes to *Neilson* v. *Fothergill*. See also *Cutler* v. *Bower*, 1 Q. B. (A. & E.) 973 [1848]; *Pidding* v. *Franks*, 1 Mac. & G., 56 [1849].

[2] 6 C. B (N. S.) 771 [859].

[3] 2 C. B. (N. S.) 22 [1857].

[4] C. B. (N. S.) 67 [1857].

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and *Lawes* v. *Purser*;[1] that a plea stating that the invention was worthless was invalid, since the contract in such cases is for the use of the patent, such as it is, and that, the agreement being under seal, and *no fraud being alleged*, the defendant was estopped from going into the consideration.

The assignee of a patentee may, equally with the patentee, maintain an action for infringement, and a patentee who has assigned his rights to another cannot, as against him, say that he is not liable for the infringement of the patent. In *Walton* v. *Lavater*,[2] the defendant Walton assigned one moiety of a patent to the plaintiff and the other moiety to two persons who, before the cause of action accrued, assigned to the plaintiff. It was argued upon a rule for a new trial, that a grant under letters patent is indivisible,[3] and that nothing passed to the plaintiff but a mere license to use the patent and to have an account, the original franchise remaining in the patentee; but the Court of Common Pleas held that the assignee, whether of the entirety of, or of a share in, a patent takes the legal interest and is not a mere licensee. As against a licensee of such an assignee it would appear, therefore, that the ordinary estoppel applies, and that he is precluded from denying the validity of the patent.

The assignee of a patent is not a mere licensee.

Patent is severable.

Licensee of assignee is estopped.

But although a licensee of a patent cannot usually question its validity during the continuance of the license, he is entitled to have the ambit of the patent, or the field covered by the specification, ascertained, so as to shew that what he has done does not come within the limits of the patent. These propositions are illustrated by the case of *Clark* v. *Adie*[4] in the House of Lords, which was a claim by Adie to surcharge Clark on account of royalties for work done as a licensee under a patent for the manufacture of horse clippers. Clark agreed to take a license from Adie and to

Licensee may shew the limits of the patent.

Clark v. Adie [1877].

[1] 6 El. & B.,, 930 [1856].

[2] 8 C. B. (N. S.) 162 [1860]. See the case of *Oldham* v. *Langmead*, referred to by Lord Kenyon, C.J., in *Hayne* v. *Maltby*, 3 T. R., 441 [1789].

[3] In *Dunnicliff* v. *Mallet*, 7 C. B. (N. S.) 209 [1859], the Court of Common Pleas held that an assignee of a separate and distinct portion of a patent might sue for infringement without making those interested in the other part parties, holding a patent to be severable in its nature. With respect to copyright the rule appears to be different, see *Jefferys* v. *Boosey*, 4 H. L. Cas., 815 (992) [1854], where Lord St. Leonards observes: "Copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible; or is a right which may be transferred, but which cannot be divided."

[4] L. R., 2 Ap. Ca., 423 [1877].

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pay a royalty for every horse clipper sold during the validity of Adie's patent. Clark afterwards asserted that the clippers made by him were made after the description in other patents, and were not infringements of Adie's patent, and contended that he was not estopped from shewing the extent and limits, and the real nature, of Adie's invention; and that the rule against a licensee disputing the validity of his licensor's patent must be taken as subject to this qualification. The House of Lords, while affirming the above principles, held that Clark had, by the manufacture of the clipping machines made by him, infringed Adie's patent, and that, having used it in this way he was, being a licensee, bound to pay royalty.[1] Lord Blackburn further compared the position of Clark to that of a tenant, who in an analogous case would have been bound to pay rent for the land held by him.[2]

His position analogous to that of a tenant.

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[1] Lord Cairns observed, p. 425: "As between the appellant, the licensee, and the respondent, Adie, the patentee (whatever strangers might have to say as to the validity of this patent,) the question of validity must be taken as that which the appellant is unable to dispute.....but, on the other hand, he is, of course, entitled to have ascertained what is the ambit, what is the field, which is covered by the specification as properly construed; and he is entitled to say: 'Inside of that field I have not come; so far as I have worked I have worked outside the limit which is covered by it, as properly construed, and therefore I am not bound to make any of those payments which are stipulated in my license as payments to be mabe for working the patent.' In this respect the appellant, the licensee, stands here upon the same issue as would arise between a patentee and an alleged infringer upon the question of the fact of infringement."

[2] "The position of a licensee who under a license is working a patent right for which another has got a patent, is very analogous indeed to the position of a tenant of lands who has taken a lease of those lands from another. So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying that his lessor had a title to that land. When the lease is at an end, the man who was formerly a tenant, but has now ceased to be so, may shew that it was altogether a mistake to have taken that lease, and that the land really belonged to him; but during the continuance of the lease he cannot shew anything of the sort; it must be taken as against him that the lessor had a title to the land. Now a person who takes a license from a patentee, is bound upon the same principle and in exactly the same way. The two cases are very closely analogous; in analogies there are always apt to be some differences, but I know of none in this. The tenant under a lease is at liberty to shew that the parcel of land which he and the lessor are disputing about was never comprised in the lease at all;... so may a licensee under a patent shew that, although he accepted the license, and worked the patent, and the patentee could never, therefore, so long as that license was in existence, bring an action against him as an infringer, yet the particular thing which he has done was not a part of what was included in the patent at all, but that he has done it as one of the general public might have done it, and therefore is not bound to pay royalty for it. If he has used that which is the patent, and which his license authorises him to use without the patentee being able to claim against him for infringement, because the license would include it, then like a tenant under a lease, he is estopped from denying the patentee's right, and must pay royalty," pp. 435, 436.

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In the matter of D. H. R. Moses [1887].

Clark v. *Adie* has been followed in this country in a case the circumstances of which were different. *In the matter of Act XV of* 1859, *in the matter of D. H. R. Moses*[1] was a proceeding[2] in which a patent was attacked by a person who had no real interest apart from the licensee who was found to be the real applicant, and the decision turned upon this question, the principle of *Clark* v. *Adie* being recognised. The applicant, one Moses, being desirous of adding sugarcane mills to his business and of introducing a new mill to the market, allowed his name to be used on behalf of one Fox, who was a licensee under the patentees. The Court having found that Moses had no substantial interest in the matter, proceeded to deal with the application as if Fox's name appeared as the petitioner, at all events, jointly with Moses, and held that the petition could not be maintained within the doctrine of *Clark* v. *Adie,* because one of the petitioners, and the most active of them, being a licensee, his mouth was closed in such a way that he was not in a position to challenge the patent.[3]

The rights and powers of the licensee after the license has come to an end were referred to in the arguments, *Neilson* v. *Fothergill*[4] and *Lawes* v. *Purser*[5] being cited to shew that a licensee may terminate the relation created by his contract, and it was argued that this had been done in the case, inasmuch as it was a proceeding to set aside the patent as being a fraud upon the public. But the Court, while observing that these cases established the proposition contended for, held that the license was subsisting when the proceedings were instituted.[6]

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[1] I. L. R., 15 Calc., 244 [1887].

[2] See Act XV of 1859, s. 24, and the corresponding section (30) in Act V of 1888.

[3] Petheram, C. J., after citing the observations of Lord Cairns in *Clark* v. *Adie* above set out, observed :—"These words of Lord Cairns are perfectly general as to the position of a licensee. He there states the law to be, that a person who occupies that position, and has undertaken to manufacture machines as being the subject of an invention which has been patented, and so to make a profit out of the patent, must be taken as having admitted the validity of the patent, and as being a person who cannot, as between himself and the patentee, dispute the validity or novelty of the invention or any other circumstances which go to make a valid patent. Therefore it seems to us that this case establishes the position—and that is what we should have expected it to do, because it does not seem there could be any doubt what the law would be—that a person who occupies that position and makes a profit out of the patent cannot afterwards, as between himself and the patentee, say that this thing is invalid as against the world," p. 250.

[4] Webst., 290 [1841].

[5] 6 El. & Bl., 930 [1856].

[6] The Court remarked: "What those cases deal with is the question of the rights and powers of a licensee after the license has expired, or when it has been repudiated

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Patentee may not derogate from his own grant.

The estoppel is also reciprocal, for a patentee may not derogate from his own grant. In *Chambers* v. *Crichley*,[1] the defendant, upon dissolving partnership with the plaintiffs, assigned to them all his interest in a patent which formed part of the assets, and afterwards sold stoves made upon the principle described in the same patent. In a suit for an injunction and an account, Sir John Romilly, M. R., observed :—"I will assume for the purpose of my judgment that the patent is worth nothing at all. But this is certain, that the defendant sold and assigned that patent to the plaintiffs as a valid one, and having done so he cannot derogate from his own grant. It does not lie in his mouth to say that the patent is not good ;" and an injunction was granted.

Estoppel against patentee considered in Cropper v. Smith [1884].

What may or may not amount to an estoppel against a patentee was considered by the Court of Appeal in two recent cases. In *Cropper* v. *Smith*[2] the original patentee, Hancock, became insolvent, and his trustee in liquidation in 1877 sold the letters patent to the plaintiffs. In 1880 Hancock took out another patent, and in 1881 the plaintiffs sued him and his partner to restrain them from infringing the earlier patent which they had purchased. The case was decided upon another point subsequently reversed by the House of Lords,[3] but the observations of the Court of Appeal, which was at one upon the question of estoppel, are most useful. It was argued that Hancock was estopped from denying the validity of his own patent by the letters patent which were recorded, by the specification which was by deed poll, and by the petition which he presented to the Crown, because he there represented that the invention was a new one. The Court held that there was no estoppel upon any one of these grounds. Upon the ground of the record there could be no estoppel between the plaintiffs, who were not parties or privies to the record, and Hancock ; though Fry, L.J., expressed an opinion that there might be an estoppel by

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or when it has terminated in any way ; and what they have decided is this, that although a man may hold the position of a licensee at one time—if that license has expired by effluxion of time or has come to an end for any reason, he is at liberty to challenge the patent. But in this case we do not think that these authorities have any application, and for this reason that both Mr. Mylne and Mr. Neil Fox swear that at the time when these proceedings were instituted, he, Mr. Neil Fox, held a license to work this patent .. and if it appears that this proceeding is bis it must fail for that reason."

[1] 33 Beav., 374 [1864].

[2] L. R., 26 Ch. D., 700 [1884].

[3] L. R., 10 Ap. Ca., 240.

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record between the Crown and a grantee of his letters patent. As regards the estoppel by reason of the specification—that contained no assertion as to the novelty or validity of the patent, but merely declared the nature of the invention, nor were the plaintiffs parties to it. There might, however, have been an estoppel *in pais* had the plaintiffs acted in reliance on the statements in the petition, and had it been shewn that they purchased on the faith of the assertion by Hancock that the invention was new. "The plaintiffs," said Cotton, L.J., "gave a very small sum for this patent, and, as a rule, people do not rely on any statement made by the patentee, but they buy the patent forming their own opinion as to its worth, taking their chance (unless it has been established), of there being able to establish its validity if the question comes before a Court of law."

Conduct not amounting to abandonment of legal rights does not estop patentee. Proctor *v.* Bennis [1887].

The position of a patentee is further explained in *Proctor* v. *Bennis*.[1] It has been seen that both the purchaser of a patent and the licensee of a patent are presumed to have acted upon their own judgment. In the same way it is no part of the patentee's duty to warn persons that what they are doing is an infringement, and he will not be estopped upon any supposed ground of acquiescence from asserting his rights, unless his conduct has amounted to a representation upon which the others have acted. In the case now cited Proctor sued Bennis and certain purchasers of Bennis's machines for infringement. Proctor was aware of the purchases, and had asked the purchasers to buy his machines in preference to Bennis's. He stated that he had not at that time funds to take proceedings against the infringers, and he did not warn the purchasers because he did not consider it his business to do so. The purchasers relied on the acquiescence of the plaintiff in their purchases, and the Vice-Chancellor found in their favour. The Court of Appeal were of a different opinion, holding that the purchasers were not entitled to succeed either on the equitable doctrine of acquiescence,[2]

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[1] L. R., 36 Ch. D., 749 [1887].

[2] Upon the question of acquiescence Cotton, L.J., observed [760]: "The right of the patentee does not depend on the defendant having notice that what he is doing is an infringement. If what the defendant is doing is, in fact, an infringement, his having acted *bonâ fide* and honestly will not protect him from an injunction. It does not depend upon notice; a monopoly has been granted to the patentee, and what is necessary in order to raise an equity against him is shewn by Lord Cranworth in *Ramsden* v. *Dyson* [L. R., I. E. & I., Ap., 129 (140) 1866]. 'If a stranger begins to build on my land supposing it to be his

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Those who infringe a patent act at their own peril.

or on the legal doctrine of estoppel by conduct,[1] the ingredients necessary to each of these defences being wanting. Proctor had put forward a commercial reason why he desired the defendants to purchase his machine, *viz.*, that it was the better of the two, but in doing so he did not suggest or represent that he had abandoned his legal rights; nor was there any evidence that Proctor had stood by and knowingly allowed the defendants to expend money in ignorance of the fact that he had rights which he meant to assert.[2]

The rights of partners working a patent before and after dissolution.

The relative positions of partners, after dissolution, who have, during partnership, been working a patent requires notice. Where a patent has been so worked under circumstances affording a presumption that the partners did not, during the existence of the partnership, dispute its validity the Court has, upon an interlocutory application for an injunction by one of the partners to restrain the other, assumed that the patent was

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own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers, that when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.' It is necessary that the person who alleges this lying-by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title. Here none of these defendants state that they never knew anything about the plaintiff's patent."—Upon this point Bowen, L.J., said [762]: "Did the defendants think the plaintiff had no rights and never meant to assert any, and draw from his inaction the inference that they migh safely proceed? They do not say so themselves, and how can we assume that men are misled, who, when they are called into the box, will not and do not say so?—It seems to me that the true inference of fact to be drawn here is, that these defendants other than Bennis were acting at their own peril throughout, and knew that they were so acting. Although they reckoned on security, and although for a long time the plaintiff did not interfere, there was nothing on the part of the plaintiff to lull them into security."

[1] "In my opinion," said Cotton, L.J., mere silence, merely not giving notice to the defendants that what they were doing was an infringement, cannot reasonably be taken as any representation that what they were doing was not an infringement. It would be going much too far to hold that the omission of the patentee to say—'now you are infringing my patent'—amounted to a representation by him that what the parties were doing was not an infringement."

[2] See further as to acquiescence *Willmott* v. *Barber*, L. R., 15 Ch. D., 96 [1880]: *Cairncross* v. *Lorimer*, 3 Macq., 827 [7 Jur. N. S. 149 (1861)]; *Duke of Leeds* v. *Earl of Amherst*, 2 Ph., 117 (123) [1846]; *DeBussche* v. *Alt*, L. R., 8 Ch. D., 286 (314) [1878] If, as pointed out in the principal case [758], the question had arisen upon an application for an interlocutory injunction, where the Court does not interfere unless the plaintiff has been prompt, Proctor might have been held to be barred by the delay.

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valid.[1] But it is otherwise where partners, being advised that a specification was bad, took no proceedings to restrain infringement. In *Axmann* v. *Lund*,[2] two partners worked a patent for some years and asserted its validity by issuing circulars warning the public against infringing it, but took no proceedings against infringers, being doubtful as to the validity of the patent. Upon the partnership being dissolved, the plaintiff assigned his interest in the patent to the defendant, who carried on the business as before. The bill alleged that the defendant was asserting that the plaintiff was infringing the defendant's patent and was threatening the plaintiff's customers, and an injunction was prayed. The plaintiff contended that the patent was invalid, and required the defendant either actively to assert its validity or to abstain from threatening legal proceedings. For the defendant it was argued, upon the authority of *Crossley* and *Dixon*[3] and *Chambers* v. *Crichley*,[4] that the plaintiff could not question the validity of the patent. Malins, V.C., held that the plaintiff was, during the continuance of the partnership, precluded from disputing the validity of the patent, but that after its expiration he was at liberty to do so, subject to his being answerable in damages in case the defendant established the validity of the patent against him.

Third parties.

In *Heugh* v. *Chamberlain*[5] it was held that, although the assignor of a patent is estopped from disputing its validity, that rule does not apply to his partner who entered into partnership with him after the assignment, although it was alleged that both partners were infringing the patent. *Goucher* v. *Clayton*[6] was a case decided partly upon the ground that the license had expired; there the members of a firm consented to judgment being entered against them at the suit of a patentee, and immediately afterwards took out a license. Upon the expiration of the license the defendants in the former suit, and certain persons who had since joined the firm, continued to infringe the plaintiff's patent. In a further suit to restrain infringement, Wood, V.C., held that the defendants were not estopped from alleging want of novelty in the

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[1] *Muntz* v. *Grenfell*, 2 Coop., 61 (*n*) [1842], *per* Knight Bruce, V.C.

[2] L. R., 18 Eq., 330 [1874].

[3] 10 H. L. Cas., 293 [1863].

[4] 33 Beav., 374 [1864].

[5] 25 W. R. (Eng.), 732 [1877], *per* Jessel, M. R.

[6] 34 L. J. (Ch.) 239 [1865].

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invention or insufficiency in the specification, the license having expired and the judgment being a part of the same transaction; and that in any event he could not prevent the defendants who were not parties to the previous suit from setting up this defence.

Award of arbitrator as to validity of patent.

In *Newall* v. *Elliot*[1] the Court of Exchequer expressed an opinion that the award of an arbitrator, to whom proceedings in Chancery were referred in which the validity of a patent was in question, was not conclusive in an action between the same parties for another infringement, since it was only by inference that the award could be said to be a decision upon the points in dispute, and estoppels must be certain.[2]

Position of licensee of trade-mark.

The case of trade-marks has to be noticed. A right to use a trade-mark may be created by license or assignment, in which case the licensee will be in the same position as the licensee of a patent.[3]

Abandonment.

A right to a trade-mark may be abandoned, and the owner may, in respect of a trade-mark as in respect of any other right, be estopped by his conduct from denying the title of another person.[4]

Estoppel against owner. Lavergne v. Hooper [1884].

In *Lavergne* v. *Hooper*[5] the defendant's firm obtained permission from the plaintiffs to use their Maltese Cross label as a trade-mark, engaging to sell no other brandies under that trade-mark than such as were procured from the plaintiffs. The sale of the brandies so imported was advertised and pushed by the defendants, and became known in the market by a different name. The Court held that, even if the plaintiffs had retained a right to the Maltese Cross at the date of the alleged contract, they had induced the defendant's firm to believe that they claimed no such right, and that it was open to the latter to adopt the mark. It being

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[1] 1 H. & C., 797 [1863].

[2] Co. Lit., 325*b*.

[3] *Lavergne* v. *Hooper*, I. L. R., 8 Mad., 149 (154) [1884], where it is observed that the right to a trade-mark in another country will be recognised in this country: "The object of the law in recognising a right to trade-marks is to protect the public from fraud, to secure to a purchaser a reasonable certainty that he is purchasing an article which has a certain reputation in the market, and to secure to a manufacturer or selector the reward of his skill and care, the benefit of the custom which he deserves and which is intended for him." A trade-mark is defined as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant. See *Badische Aniline &c., Co.* v. *Maneckji Shapurji Katrak*, I. L. R., 17 Bom., 583 [1892], where the cases as to trade-marks are collected.

[4] *Ib.*, 154.

[5] *Ib.*

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admitted also that the defendants had secured a wide popularity for the mark by their own expenditure and exertions, the plaintiffs were estopped from denying the title of the defendants to the use of the mark, in the Indian market at least.

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CHAPTER V.

BAILOR AND BAILEE.

Estoppel against bailee analogous to tenant's estoppel—Incidents of the contract—Constructive bailment by assent to delivery orders—*Knights* v. *Wiffen* [1870]—Attornment by wharfinger—Recognition by unpaid vendor of title of sub-purchaser—Position of bailee under the contract of bailment—Bailee may (*a*) shew that his own title has determined; (*b*) shew that the bailor's title has determined; (*c*) plead and prove the title of the real owner; (*d*) institute interpleader proceedings—*Biddle* v. *Bond* [1865], the law stated in,—*Rogers, Sons & Co.* v. *Lambert* [1890]—The *jus tertii*—Estoppel by election—*Ex-parte Davies, In re Sadler* [1881]—Criminal act of servant of bailee—Where fraud effected by third party *semble* no estoppel unless there is direct negligence on the part of the bailee or his servant.

Estoppel against bailee analogous to tenant's estoppel.

THE estoppel upon BAILEES and those with whom property is, either actually or constructively, deposited bears a close resemblance to the estoppel of the tenant. The rule is expressed in section 117 of the Evidence Act in analogous terms,[1] and the same exception applies that, where something equivalent to title paramount has been asserted against the bailee or licensee, he is discharged as against those who entrusted the goods to him. The

Incidents of the contract.

bailee is protected by the bailor's title so long as no better title is advanced,[2] the general rule being that one who has received property from another as his bailee or agent or servant must account for that property to him from whom he received it.[3] It is an implied term of the contract of bailment that the bailor, at the time of bailment, had a good title to the goods bailed.[4]

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[1] "Nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

"Explanation 2. If a bailee delivers the goods bailed to a person other than a bailor, he may prove that such a person had a right to them as against the bailor." See *Shelbury* v. *Scotsford*, 2 Yelv., 22.

[2] Contract Act (IX of 1872), s. 166: "If the bailor has no title to the goods and the bailee in good faith delivers them back to or according to the directions of the bailor, the bailee is not responsible to the owner in respect of such delivery."

[3] *Per* Blackburn, J., in *Biddle* v. *Bond*, 6 B. & S., 231 [1865].

[4] See *Rogers, Sons & Co.* v. *Lambert*, L. R., 91; 1 Q. B. 327, *per* Lopes, L. J. As to bailments generally, see Contract Act (IX of 1872), ss. 148—161; *Coggs* v. *Bernard*, 1 Sm. L. Ca., 9th ed., 201.

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It follows, therefore, that the bailor, where the goods have been sold by the bailee, is entitled to follow the proceeds in the bailee's hands.

In the same way a bailee may, by his conduct, be estopped from denying that he is holding goods on behalf of another under delivery orders, though the property has never been separated or identified, and is only constructively deposited.

Constructive bailment by assent to delivery orders.

The estoppel by assent to delivery orders[1] would seem to be an instance of constructive bailment. There the fact of the wharfinger assenting to the order is held to estop him from denying that he holds goods answering to the description in the order at the disposal of the person to whom the orders were given, though the goods may never have been separated in bulk, and no property in any specific articles can have passed to the person entitled to delivery.

Knights v. *Wiffen*[2] is a typical case. Wiffen sold to M barley lying in his granary unappropriated, which, upon the contract, remained in Wiffen's possession as unpaid vendor. M sold Knights sixty sacks of the barley and gave him a delivery order, addressed to the station-master, instructing him to deliver sixty quarters of barley to Knights' order. Knights sent the order in a letter to the station-master asking him to confirm the transfer. The station-master went to Wiffen and shewed him the delivery order and the letter, to which Wiffen said: "All right, when you get the forwarding note, I will put the barley on the line." The Court of Queen's Bench[3] held that this amounted to a recognition by the defendant of the plaintiff as the person entitled to the possession of the barley, the plaintiff being thereby induced to alter his position towards M, and to rest satisfied in the belief that the property had passed to him.[4]

Knights *v.* Wiffen [1870].

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[1] See *infra*, pp. 155—157.

[2] L. R., 5 Q. B., 660 [1870]. See the remark of Brett, L. J., upon this case in *Simm* v. *Anglo-American Telegraph Co.*, L. R., 5 Q. B. D., p. 212 [1879]. "I confess it seems to me that in that case two [illegible] doctrines were mixed up, the doctrine of estoppel, and the doctrine of attornment by a warehouseman who has goods in his hands."

[3] Blackburn, Mellor, and Lush, JJ.

[4] See for similar cases *Woodley* v. *Coventry*, 2 H. & C., 164; 32 L. J. (Ex.), 185 [1863]; *Stonard* v. *Dunkin*, 2 Camp., 344 [1810]; *Hawes* v. *Watson*, 2 B. & C., 540 [1824]; *Gillett* v. *Hill*, 2 C. & M., 530 [1834]; *Ganges Manufacturing Co.* v. *Sourujmull*, I. L. R., 5 Calc., 669 [1880]. Contract Act (IX of 1872), s. 98. See also *Eagleton* v. *The East India Railway Co.*, 8 B. L. R., 581 [1872], where Couch, C. J., citing *Sheridan* v. *The New Quay Co.* [4 C. B.,

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Attornment by wharfinger.

In all these cases, as pointed out by Blackburn, J., in *Biddle* v. *Bond*, the wharfinger by attorning to the purchaser of the goods has in effect represented to him that the property has passed to him, though such is not the case; the relation therefore of bailor and bailee may be said to be constructively created; and, as observed by Pollock, C. B., in *Cheesman* v. *Exall*,[1] there are numerous cases in connection with wharves and docks in which, if the party entrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business. This remark may be extended to the case where the parties have agreed to act upon an assumed state of facts; their rights are then made to depend upon the conventional state of facts and not on the truth.[2]

Henderson & Co. v. Williams [1894].

The cases are collected and discussed in *Henderson & Co.* v. *Williams* in the Court of Appeal[3] where the wharfinger attorned to the purchaser, Halsbury, L. C., citing with approval the observations in an American case of *Root* v. *French* [13 Wend., 570].

Recognition by unpaid vendor of title of sub-purchaser.

This subject may often be regarded as a branch of the law of Vendor and Purchaser;[4] coming within the class of cases where an unpaid vendor is estopped from asserting his lien by reason of his having recognised the title of a subsequent purchaser.[5]

Position of bailee under the contract of bailment.

The respective rights of bailor and bailee may be shortly presented in the following concise form:—

As between a bailee and his bailor, under an ordinary contract of bailment, the bailee in an action for non-delivery of goods upon the demand of his bailor must take one of four courses:[6] (*a*) He may show (what is equivalent to a surrender in the case of a tenant) that his own title has determined, or that he has

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N. S., 618], remarks that if the defendants, who were carriers, had been able to prove a *jus tertii*, they would have had a good answer to the plaintiff's claim. See p. 602.

[1] 6 Exch. 341 (346) [1851].

[2] See the remarks of Lord Blackburn in *Burkinshaw* v. *Nicholls*, L. R., 3 Ap. Ca., 1004 (1026); Blackburn on Sale, 2nd ed., pp. 190—196.

[3] L. R., '95, 1 Q. B., 521.

[4] See *infra*, Part I, Chap. VI, where the case of *The Ganges Manufacturing Co.* v. *Sourujmull* [I. L. R., 5 Calc., 669 (1880)], is fully noted. There the defendant's agent wrote on the orders: 'The bearer of this will take personally delivery of each lot as required;' and upon the faith of this order the plaintiffs were induced to make advances.

[5] Contract Act (IX of 1872), s. 98. See *infra*, p. 131.

[6] See *Rogers, Sons & Co.* v. *Lambert & Co.*, L. R., 1 Q. B., '91, 325, *per* Lord Esher, M. R.

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already delivered the goods upon a delivery order authorised by the bailor ; (*b*) or he may show, equally with a tenant, that the title of his bailor to the goods has expired since the bailment ;[1] (*c*) he may claim under another title and defend the action on behalf of the real owner, but in this case he must allege and prove the title of the real owner and must defend expressly upon that title ; (*d*) it is open to him to say that he is a mere stake-holder, and to institute a suit of interpleader against the claimants, unless a suit is already pending in which the rights of all parties can properly be decided.[2]

If a person other than the bailor claims the goods, that person may apply to the Court to stop the bailee from delivering the goods to the bailor, and the question of title will then be decided ;[3] but this course is not open to the bailee, who must either bring an interpleader-suit, or give up the goods under an indemnity to the person claiming them.

It follows that where a bailor has so conducted himself as to expose the bailee to an action at the suit of some third person, as by mortgaging the chattel bailed, he cannot claim the chattel from the bailee, where the mortgagee asserts his title and the bailee relies on the mortgagee's title. The principle here is the same as that laid down in section 53 of the Contract Act.[4]

Statement of the law in Biddle *v.* Bond [1865].

The law as to the whole subject is elaborately discussed in the judgment of Blackburn, J., in *Biddle* v. *Bond* [5] referring to the previous cases. The rule as to the *jus tertii* is further explained by the Court of Appeal in the recent case of *Rogers, Sons & Co.* v. *Lambert*.[6]

The facts in the earlier case were exceedingly simple. The plaintiff took in execution goods belonging to one Robbins for rent alleged to be due, and delivered them to the defendant, an auctioneer, to sell. Robbins having given the defendant notice, as the sale was commencing, that the relation of landlord and tenant

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[1] *Thorne Tilbury*, 3 H. & N., 534 [1858].

[2] See as to the procedure in interpleader suits ss. 470—476 of the Code of Civil Procedure (Act XIV of 1882) ; see the remarks of Lindley, J., in *Rogers, Sons & Co.* v. *Lambert*, L. R., '91, 1 Q. B., 327, as to the propriety of instituting interpleader-proceedings in cases of bailment.

[3] Contract Act (IX of 1872), s. 167.

[4] See *The European & Australian Royal Mail Co.* v. *The Royal Mail Steam Packet Co.*, 30 L. J., C. P., 247 [1861] ; *Sheridan* v. *The New Quay Co.*, 4 C.B., N. S., 618 (S.C.) ; 28 L. J., C. P., 58 [1858].

[5] 6 B. & S., 225 [1865].

[6] L. R., '91, 1 Q. B. 318 [1890].

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did not exist between him and the plaintiff, and that no rent was in arrear, the defendant having no time to make enquiries proceeded to sell the goods. The bailor brought an action for the price of the goods alleging that he had delivered them to the defendant to sell on his account as his agent. The Court (Willes, J.) inferred from the facts that Bond withheld the proceeds of the goods from the plaintiff and defended the action relying on the right and by the authority of Robbins and not hostilely to him. The question of law was argued upon a rule before the Court of Queen's Bench,[1] when the defence was held to be a good one. It is pointed out by Blackburn, J., who delivered the judgment of the Court, that the true ground upon which a bailee is allowed to set up the title of a third person as against the bailor is that the estoppel ceases when the bailment, upon which it is founded, determines by what is equivalent to an eviction by title paramount; but the *jus tertii* must be actually asserted against the bailee, who can only set up the title of another if he defends upon the right and title and by the authority of the third party.

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[1] Cockburn, C. J., Blackburn and Mellor, J. J: "We do not question the general rule," said Blackburn, J., "and we agree with what is said by my brother Martin in *Cheesman* v. *Exall*, 6 Exch., 341 (346) [1856], that 'there are numerous cases in connection with wharfs and docks, in which, if the party entrusted with the possession of property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business.' But the bailee has no better title than the bailor, and consequently, if a person entitled as against the bailor claims it, the bailee has no defence against him: *Wilson* v. *Anderton*, 1 B. & Ad., 450 [1830]. Such was the position of the defendant in the present case. If Robbins had chosen to sue him in trover, or, waiving the tort, had sued him for money had and received, the defendant would have had no defence. He was, therefore, compelled to yield to Robbins' claim, and it would certainly be a hardship on him, if, without any fault of his own, the law has left him without any defence against the plaintiff for so yielding. We do not, however, think that such is the law. Several cases were cited on the argument at the bar and more might have been cited, such as *Stonard* v. *Dunkin*, 2 Camp., 344 [1810]; *Gosling* v. *Birnie*, 7 Bing., 339 [1831]; *Hawes* v. *Watson*, 2 B. & C., 540 [1824], in which a bailee, who, by attorning to a purchaser of goods in effect represented to him that the property has passed to him (although such was not the fact), and thereby induced him to alter his position and pay the price to his vendor, has been held estopped from denying the property of the person to whom he has thus attorned by setting up a title in a third person inconsistent with the representation on which he induced the plaintiff to act. We in no way question that those cases were rightly decided. But in all of them the estoppel proceeded on the representation, which was analogous to a warranty of title for good consideration to the purchaser. Now, in the ordinary class of bailments, such as the present, the representation is by the bailor to the bailee that he may safely accept the bailment; and, so far as any weight is to be given to the representation, it makes against the estoppel. This is pointed out

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Biddle v. *Bond*[1] was followed by the Court of Appeal[2] in *Rogers, Sons & Co.* v. *Lambert*,[3] which was an action for wrongful detention of copper, purchased by the plaintiffs from the defendants, and for damages. The plaintiffs paid for, and left the copper in the possession of the defendants as warehousemen subject to warehousing charges, and the defendants gave to the plaintiffs delivery orders directing delivery to the order of the plaintiffs, and entered the plaintiffs' name in their warehouse books as owners of the copper. After the bailment of the copper,

Rogers, Sons & Co. *v.* Lambert [1890].

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by Parke, B., in *Cheesman* v. *Exall*, 6 Exch., 341, 344 [1851], in the case of a pledge, and is indicated as one of the grounds on which the judgment of the Common Pleas proceeded in *Sheridan* v. *The New Quay Co.*, 4 C. B., N. S., 618 [1858], which was the case of a carrier. The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant who, having accepted the possession of land from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount. This was decided as early as the 44 Eliz., in *Shelbury* v. *Scotsford*, Yelv., 22. In *Wilson* v. *Anderton*, Littledale, J., ... states the law to the same effect. And accordingly in *Hardman* v. *Willcock* [see 9 Bing., 382 n. (*a*) (1832)] in *Cheesman* v. *Exall*, and in *Sheridan* v. *The New Quay Co.*, a bailee was permitted under circumstances similar to the present to set up the *jus tertii*. It is true that in the two first of these cases the plaintiffs had obtained the goods by a fraud upon the person whose title was set up, whilst in the present case there is nothing in the evidence to shew that plaintiff though a wrong-doer, did not honestly believe that he had a right to distrain. But we do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same, whether his bailor was honestly mistaken as to the rights of the third person or fraudulently acting in derogation of them. We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury* v. *Scotsford*, viz., that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in *Betteley* v. *Reed*, 4 Q. B., 511, 517 [1843], that 'to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another who makes no claim, or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsover.' Nor is it enough that an adverse claim is made upon him so that he may be entitled to relief under an interpleader. We assent to what is said by Pollock, C. B., in *Thorne* v. *Tilbury*, 3 H. & N., 534 (537) [1858], that a bailee can set up the title 'if he defends upon the right and by the authority' of that person. Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences."

[1] 6 B. & S., 225 [1865].

[2] Lord Esher, M. R., Lindley and Lopes, L. J. J.

[3] L. R., 1 Q. B.,' 91, 318 [1890]. The case also came before Denman and Wills, JJ., upon appeal from an order allowing interrogatories as to whether the plaintiffs had not, since the date of the bailment, sold the copper and received the price for the same, and had not endorsed and handed delivery orders to their vendees. The interrogatories were disallowed upon the ground that Lambert & Co. could not set up against their bailors a title under which they did not profess to defend the action. L. R., 24 Q. B. D., 573.

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the plaintiffs sold to a firm of Morrison, Kekewich & Co., and endorsed the delivery orders to them, but subsequently, before action, revoked the delivery orders, and gave notice to the defendants not to deliver the copper to any one but themselves. The defendants, who sought to hold the copper against Morrison, Kekewich & Co. to meet a heavy claim which they had against them, defended the action in their own interest, and without reference to the right or authority of Morrison, Kekewich & Co. Day, J., held that the plaintiffs had ceased to have any interest in the copper, and gave judgment for the defendants. This decision was reversed by the Court of Appeal upon the ground that the defendants as bailees could not avail themselves of the title of Morrison, Kekewich & Co., except by defending on their behalf and by their authority. It was open to the defendants to institute interpleader-proceedings between the rival claimants, or to allege and prove the title of Morrison, Kekewich & Co., but they did not adopt either of these courses.

The Jus tertii.

Estoppel by election.

The principle of election is, however, applicable where a bailee, knowing of the adverse claim of a third person, elects to support his bailor, or conversely elects to support an adverse title against his bailor. In such a case, it is conceived, he will be estopped from denying the title he has elected to support. In *Ex-parte Davies, In re Sadler*,[1] the former case occurred. An auctioneer held possession of goods on behalf of a trustee in bankruptcy, and by his directions advertised the goods for sale, sold them for the trustee, and received the sale-proceeds. The holder of a registered bill of sale, on whose behalf the auctioneer had previously taken possession of the goods, gave him notice not to part with the sale-proceeds. The trustee applied to the Court for an order for payment of the money to him, and the bill of sale-holder commenced an action against the auctioneer for the sale-proceeds. The money having been paid into Court, the auctioneer to protect himself set up the title of the bill of sale-holder. The Court of Appeal held that the auctioneer, with full knowledge of an adverse claim, had deliberately elected to sell the goods for the trustee, and could not therefore set up the *jus tertii*.[2]

Ex-parte Davies, In re Sadler [1881].

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[1] L. R., 19 Ch. D , 80 [1881].

[2] Lush, L. J., said: "The bill of sale-holder was not before the Court at all . . It is not necessary now to say whether his

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Criminal act of servant of bailee.

The question, whether an estoppel can arise against a common carrier or a Railway Company in respect of the criminal acts of its agents or servants, or persons effecting a fraud while purporting to act as such, is one of some difficulty. In *Machu* v. *The London and South-Western Railway Co.*,[1] a delivery ticket was issued by the Company containing the name of one Johnson, who was described as a porter, and signed by Chaplin and Horne, sub-contractors with the Company. Johnson stole the goods while under the charge of the sub-contractors. The Court of Exchequer held that Johnson was a servant in the employ of the Company within the meaning of the Carriers Act, 11 Geo. 4 and 1 Will. 4, c. 68. But Rolfe and Platt, B. B., appeared to think that the ticket was only matter of evidence and did not work an estoppel. Pollock, C. B., however, suggested that the inference from the document was that Johnson was a servant of the Company.

Where fraud effected by third party *semble* no estoppel.

In *Way* v. *Great Eastern Railway Co.*,[2] the theft was effected by a person, not in the employment of the Company, who represented himself to be one of the carmen of their contractor, and obtained from their delivery clerk a pass which enabled him to drive the van containing the pictures out of the yard and so steal the pictures. It was argued, upon the authority of the opinion of Pollock, C. B., in the former case, that the defendants had trusted the thief as their servant and were estopped from so denying; but the Court held that it was impossible, upon any fair construction of the Act, to hold them liable. Blackburn, J., said: "It is impossible to say that the defendants have so acted as to represent that the thief was their servant. This is a highly artificial attempt

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claim is a valid one; the only question is whether the money ought to be paid out to the trustee, and I have no doubt that it ought. The intended sale under the instructions of the bill of sale-holder was stopped by the Court; the trustee asserted his claim, and the auctioneer, with full knowledge of the other claim, elected to take the part of the trustee He knew what the title of the bill of sale-holder was, and he knew what the title of the trustee was. In substance what passed between him and the trustee was this: 'If you will authorise me to sell the goods on your behalf, I will undertake to hand over the proceeds of the sale, less my commission, to you.' I am of opinion that when a person in such a position, knowing of two adverse claims to the goods, elects to take the part of one of the claimants and to sell the goods as his, he is estopped from afterwards denying that claimant's title. If he had not taken this course, he would have been entitled to shew that there was a better title in the bill of sale-holder; there might have been what is called an eviction of the trustee by title paramount."

[1] 2 Ex., 415 [1848].

[2] L. R., 1 Q. B., 692 [1876].

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to make out a constructive liability on the part of the Railway Company," and Quain, J., added: "You cannot turn a person who, by false representation that he is a servant of the defendant's agent, has got from them possession of goods, into the defendant's servant for the purpose of the Carriers' Act."

Unless there is negligence on the part of bailee or his servant.

The liability in such cases (if there is a liability) would appear to rest upon the ground of agency, but in the case of a fraud perpetrated independently by a third person, it is difficult to see how any question of estoppel can arise unless the fraud is the proximate result of negligence on the part of the servants of the Railway Company or carrier.

The question, if it arises in India, will be complicated by the consideration of the different liabilities of common carriers and railways under the law applicable to them respectively.[1]

It has recently been held in England upon section 7 of the Railway and Canal Traffic Act[2] that a loss of goods by the theft of a Railway Company's servants without neglect or default of the Company was not a loss "occasioned by the neglect or default of the Company or its servants" within the meaning of that section, and therefore that the Company could at common law protect themselves by a special contract.

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[1] See *The Irrawaddy Flotilla Co.* v. *Bhugwandass*, I. L. R., 18 Calc., 620 [1891], and questions there discussed and pronounced upon.

[2] *Shaw* v. *Great Western Railway Co.*, L. R., '94, 1 Q. B., 373.

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CHAPTER VI.

VENDOR AND PURCHASER.

Unpaid vendor's lien defeated by estoppel—(*a*) Sub-sale by agent. Contract Act, s. 108—General principle as to persons in possession of property or *indicia* of property—*Ganges Manufacturing Co.* v. *Sourujmull* [1880]—Principle analogous to that applied in dealings by ostensible owners of immoveable property—Construction placed upon s. 108—History of the section—*LeGeyt* v. *Harvey* [1884]—The English Factors' Act of 1877—Its operation illustrated by *Johnson* v. *Credit Lyonnais Co.* [1877]—Limits of the estoppel—(*b*) Estoppel by election against vendor—Representation as to credit—Doctrine of election considered—The doctrine is one application of the rule of estoppel by conduct—Position of the other party is chiefly to be considered—*Thomson* v. *Davenport* [1829]—*Heald* v. *Kenworthy* [1855]—*Armstrong* v. *Stokes* [1872], distinction drawn in—Doubted in *Irvine* v. *Watson* [1880]—*Heald* v. *Kenworthy* affirmed—Estoppel must be made out clearly.

CERTAIN applications of the doctrine of Estoppel, which arise out of the relation between VENDOR and PURCHASER,[1] require to be considered separately, in connection with some provisions of the Contract Act.[2]

Unpaid vendor's lien defeated by estoppel.

I. It has been seen that a vendor who has recognised the title of a subsequent purchaser by leading the latter to suppose that he has assented to the sub-sale cannot enforce his lien.[3] This frequently happens when the vendor has parted with the documents of title, which are the *indicia* of property, to his purchaser, or has let him into possession, before payment has been made. If the latter then proceeds to sell to a third party, who purchases in good faith, believing that the person in possession of the goods or documents has a perfect right to sell, a sale by such person may bind the true owner.

(*a*) Contract Act, s. 108. Sub-sale by Agent.

Section 108[4] of the Contract Act has been stated to have been intended to embody the Factors' Act (5 & 6 Vict., c. 39) to meet

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[1] For other estoppels connected with vendors and purchasers, see p. 124, *supra*, Chapter X, 3, 6 (*a*), *infra*.

[2] Act IX of 1872, ss. 98, 108, 234.

[3] "A seller, in possession of goods sold, may retain them for the price against any subsequent purchaser, *unless the seller has recognised the title of the subsequent buyer.*" Contract Act (IX of 1872,) s 98. See pp. 23, 124, *supra*.

[4] "No seller can give to the buyer of goods a better title to those goods than he

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the case of an agent entrusted with goods,[1] and to have particular relation to the cases of persons allowed by owners to have the *indicia* of property, or possession, under such circumstances as may naturally induce others to regard them as owners, where some decree of negligence or defect of precaution is to be imputed to the true owners.[2] In the *Ganges Manufacturing Co.* v. *Sourujmull*[3] Wilson, J., enunciated the general principle in very clear terms in the lower Court:—

Persons in possession of property or indicia of property.

General principle. Estoppel by assent to mercantile document where a third party alters his position.

"Where the purchaser of goods transfers his interest to another, and gives that other a delivery order or other document purporting to entitle him to present possession, and where the original *vendor assents to the transaction* by acknowledging the title of the transferee, the original vendor cannot afterwards either deny the property of the transferee, or set up a lien for unpaid price against his right of possession; at any rate, if the transferee has acted upon the faith of such acknowledgment. Section 98 of the Contract Act states this doctrine plainly, but it only mentions in express terms the case of a sub-purchaser, and there may be some doubt whether it includes the case of a mortgagee: if it does, there is, I think, no doubt of the plaintiff's right to recover. If it does not, then the case is governed by the previous law, and the cases of *Hawes* v. *Watson*,[4] *Pearson* v. *Dawson*,[5] *Woodley* v.

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has himself, except in the following cases:—*Exception* 1.—When any person is, by the consent of the owner, in possession of *any goods*, or of any bill-of-lading, dock- warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods, of which he is in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary: Provided that the buyer acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession *of the goods or documents* has no right to sell the goods." Contract Act (IX of 1872), s. 108. See *Dyer* v. *Pearson*, 3 B. & C., 38 (42) [1824]; *Boyson* v. *Coles*, 6 M. & S., 24 [1817] and see 52 and 53 Vict. E. 45, ss. 2, 8, 9—*which extends the rule to the case of goods as well as to documents of title.* The Factors' Act of 1877, s. 4, only applied to documents of title. It will be observed that the Indian Act anticipates English legislation in this respect.

[1] *Per* Garth, C. J., in *Biddomoye Dabee* v. *Sittaram*, I. L. R., 4 Calc., 497 (499) [1878]. The expression "entrusted" does not appear in the recent Factors' Act—"Possession with consent of the owner" is substituted and consent is to be presumed.

[2] *Per* West, J., in *Shankar Murlidhar* v. *Mohan Lal Jaduram*, I. L. R., 11 Bom., 707 [1887].

[3] I. L. R., 5 Calc., 669 (671) [1880].

[4] 2 B. & C., 540 [1824]; wharfingers estopped by acknowledgment given to sub-purchasers from availing themselves of original seller's right of stoppage *in transitu*.

[5] 1 E. & B. & E., 448; 27 L. J., Q. B., 248 [1858], original seller estopped by acceptance of delivery orders given to sub purchaser.

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Coventry,[1] and *Knights* v. *Wiffen*,[2] are, I think, clear authorities for the law as I have stated it."

The rule is clear where the title of the sub-purchaser has been assented to by the original owner, or where the former has been induced to act upon a reasonable inference drawn from the conduct of the latter. A doubt has been suggested in some of the Indian cases that the rule is not equally clear where the possession of the sub-vendor is of a qualified or restricted character, and there has been no direct act on the part of the original owner, or where the original owner has been the victim of the fraud of an agent.

Is the mere parting with goods or documents of title work an estoppel?

In the *Ganges Manufacturing Co.* v. *Sourujmull*[3] Messrs. Cohen & Co. contracted with the defendants for the purchase of 180,000 gunny bags, cash on delivery, and subsequently contracted with the plaintiffs to deliver to them 87,500 gunny bags upon receiving an advance of Rs. 15,000. The defendants made over a delivery order in respect of the first contract to Cohen & Co., although the goods were not paid for, and the defendants, upon presentation of the delivery order, which was duly endorsed by Cohen & Co. in favour of the plaintiffs *and countersigned by the defendants' agents*, handed over 50,000 bags to the plaintiffs. The plaintiffs sold these gunny bags, but the defendants refused to deliver the remaining 37,500 bags on the ground that Cohen & Co. had not paid them according to the terms of their contract. The plaintiffs sued to recover the value of these bags. It was held that the defendants having by their agents consented to the transfer and induced the plaintiffs to pay Rs. 15,000, it was not open to them to repudiate the transfer which they had been the means of confirming.

Ganges Manufacturing Co. v. Sourujmull [1880].

"Certain it is," said Garth, C. J., "that upon the faith of the order which Mr. Lyall signed for the delivery of the goods to Ramrutton, the plaintiffs were induced to, and did actually, advance Rs. 15,000 to Messrs. Cohen on that same day; and the larger portion of the goods was, in fact, delivered to the plaintiffs under that order without their being required to pay for them.

Estoppel by assent to delivery order.

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[1] 2 H. & C., 164 [1863], original seller estopped by recognising title of sub-purchaser, although the specific goods were not appropriated to the latter.

[2] L. R., 5 Q. B., 660 [1870], a similar case. See *supra*, p. 123.

[3] I. L. R., 5 Calc., 669 [1880].

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The case, therefore, appears to us to come clearly within the principle of the authorities which were acted upon by the learned Judge,[1] and especially the cases of *Knights* v. *Wiffen*[2] and *Woodley* v. *Coventry*.[3] In the latter case, as in this, no actual appropriation of the goods had been made to the original purchaser; and the point was taken, as it has been here, that as there had been no severance of the particular goods, no property in them had passed to the vendees; but the Court considered that, as the delivery orders had been assented to by the defendants, the latter were estopped from denying that they held the goods, answering to the description in those orders, at the disposal of the person to whom the orders were given."[4]

Principle analogous to that applied to dealings by ostensible owners of immoveable property.

The principle in such cases is in reality the same as that already noticed in previous chapters as applicable to a purchaser or owner of immoveable property who allows another to hold possession, and to appear as the real owner to the rest of the world. Thus, in *Mohesh Chunder Chatterjee* v. *Issur Chunder Chatterjee*[5] the facts were that one Madhub Chunder in 1853 had purchased the right, title and interest of one Tara Churn at a sheriff's sale, and shortly afterwards sold the subject of his purchase to Nemoy Churn, the plaintiff's vendor. It appeared that Nemoy Churn for eleven years, during which he was entitled to immediate possession of the house, took no steps towards asserting his right, and even concealed the fact from Tara Churn, who was his near friend and neighbour. Tara Churn was meanwhile left in possession with all the *indicia* of ownership and, apart from the fact that there had been a sheriff's sale, he was not aware that either Madhub Chunder or Nemoy Churn possessed any legal rights in his house, and might have been justified in concluding that the sales had been abandoned. Eventually Tara Churn sold the premises to one Koylas Chunder, who conveyed it to the defendant's wife without notice of the rights of the plaintiff's predecessors in title.

Dealings by ostensible owners.

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[1] Wilson, J., in the Court below. See *supra*, p. 124.

[2] L. R., 5 Q. B., 660 [1870].

[3] 2 H. & C., 164 [1863].

[4] See this case further for remarks upon the scope of Chapter VIII of the Evidence Act (I of 1872) and the nature of Estoppels.

[5] 1 Ind. Jur. N. S., 266 [1866]. See Transfer of Property Act (IV of 1882), s. 41.

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"I am of opinion," said Phear, J., "that this state of facts brings the case within the rule developed in *Boyson* v. *Coles*,[1] *Dyer* v. *Pearson*,[2] *Pickard* v. *Sears*,[3] *Freeman* v. *Cooke*,[4] and approved of by the Queen's Bench in *Howard* v. *Hudson*,[5] and still later by the Exchequer Chamber in *Swan* v. *North British Australasian Co.*[6] I think that if either Madhub or Nemoy ever intended to make good the rights over Tara Churn's premises which they had respectively bought, they were bound at least to give him such notice of their rights as would prevent him from innocently selling to purchasers for valuable consideration. Not only did they not do this, but they wilfully and designedly kept him in ignorance of those rights, and left him in full possession of the property with all the symbols of ownership, knowing that there was nothing to prevent him from selling any day. Possibly Nemoy Churn relied upon the irresistible strength of his own title whenever it might suit him to assert it, but this does not relieve him from the adverse consequences of his conduct which results, I think, in his being concluded from claiming this property from Tara Churn's purchasers; and as I consider that the plaintiff does not escape from any of the equities which exist between Nemoy Churn and the defendants, I hold that he also is bound by the estoppel, although it does not spring from his own personal conduct."

Construction placed upon s. 108, in Indian cases.

To return to the case of moveable property—it has been stated that a practical limitation must be applied to the terms of the exception to section 108, so as to restrict its operation to cases where the possession of the sub-vendor is of an unqualified and unrestricted character.

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[1] 6 M. & S., 23 [1817]. Where a pawnee was held to have acquired no better title than his pawnor not having been misled by any documents with which his pawnor was armed by the proprietor of the goods. "It is laid down as a general rule," said Bayley, J., "that a pawnee cannot have a better title than the pawnor; and so it is of vendor and vendee, except in the case of a sale in market overt. But this rule will certainly not apply where the owner of goods has lent himself to accredit the title of another person by placing in his power the symbols of property which have enabled him to hold himself out as the purchaser of the goods"—p. 24.

[2] 3 B & C., 42 [1824]. Where a new trial was directed on the ground that it ought at least to have been left for the jury to say whether an owner of goods had by his conduct permitted his agent to hold himself out as the owner.

[3] 6 A. & E., 469 [1837].

[4] 6 Ex., 654 [1848].

[5] 1 E. & B., 1 [1853].

[6] 10 Jur. N. S., 102 [1864].

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Possession of factor or agent. Greenwood v. Holquette 1873].

In *Greenwood* v. *Holquette*,[1] Couch, C. J., describes the possession contemplated by the exception as the kind of possession which a factor or agent has ; where the owner of goods, although he has parted with the possession, may give instructions to the person in possession what to do with the goods. "He may give instructions to sell for not less than a particular price, or not before a particular time. It is such possession as an owner has, and in such a case, it seems to have been intended that the person selling contrary to his instructions should give a title to the buyer, if the buyer acted in good faith. We think that the exception does not apply where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose. In such a case the owner has no right to give instructions."[2] So where a piano was let on hire upon the arrangement that if duly paid for and kept three years, it was to become the property of the hirer, it was held that the hirer could not by sale transfer the ownership in the piano to another.[3] And in a case under section 178 of the Contract Act[4] where a servant entrusted with the custody of articles of jewellery pawned some of them during the absence of his mistress, it was held that he had only the bare custody of them, and had no authority to deal with them in any way whatever.[5] So in *Shankar Murlidhar* v. *Mohanlal Jaduram*[6] where S left with C a buffalo and a calf to be taken care of during his absence from home, and C sold the animals to M, it was held that S was at the time of sale in constructive possession of the animals, and C could not transfer to M an ownership which he did not possess.

The hire purchase system ; *Query* a conditional sale.

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[1] 12 B. L. R., 42 [1873].

[2] *Ib.*, 46.

[3] *Ib.* But see *Lee* v. *Butler*, L. R., '93, 2 Q. B. (C. A.), 318, 62 L. J. Q. B., 591, upon the cons ruction of 52 and 53 Vict., c. 45, s. 2, 9 ; see L. Q. R.,'94, 10, 296 ; *Helby* v. *Mathews*, L. R., 94, 2 Q. B., 262 ; *Shenstone* v. *Hilton*, L. R., '94, 2 Q. B., 452. The truth is that in England the 'hire and purchase' agreement is treated not as a 'hiring,' but as a conditional sale of the goods. The above cases extend the principle of s. 9 of the Factors' Act of 1889 to a person in possession of goods under a hire-purchase agreement.

[4] "A person who is in possession of any goods, or of any bill-of-lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant, or order for delivery or any other document of title to goods, may make a valid pledge of such goods or documents : Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly : Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud." Contract Act (IX of 1872), s. 178.

[5] *Biddomoye Dabee* v. *Sittaram*, I. L. R., 4 Calc., 497 [1878].

[6] I. L. R., 11 Bom., 704 [1887].

In *LeGeyt* v. *Harvey*,[1] the operation of the sub-section was further considered. "It is clear upon the English authorities," observed Sargent, C. J., "that a delivery order is regarded as a mere token of authority to deliver; and that before the wharfinger has attorned, it does not, independently of statute or custom, enable a purchaser to confer a title upon a vendee or sub-vendee free from the vendor's lien for the price. The English Factors' Acts (4 Geo. IV, c. 83; 6 Geo. IV, c. 94; and 5 and 6 Vict., c. 39) which were extended to this country by Acts of the Indian Legislature (Act XIII of 1840 and Act XX of 1844), created statutory exceptions to that rule in the case of 'agents entrusted with' certain mercantile documents, including a delivery order. The Indian Acts XIII of 1840 and XX of 1844 were repealed by the Indian Contract Act. It is plain that that Act gives no larger effect, except by section 108, to a delivery order, than it had by English Common Law. Section 90, Illustration (*c*), read with sections 95 and 98, shows that the giving a delivery order by a vendor to a vendee does not, of itself, give the vendee such a possession of the goods as to defeat the vendor's lien.

LeGeyt *v.* Harvey [1884]. History of the section.

"*The language of this proviso is, doubtless, very general, and the omission of the expression 'agent' and 'entrusted with' used in the repealed Factors' Acts doubtless gives the section a larger scope than those Acts possessed as construed by the Courts in England. We think, however, that it would be straining the expression 'by the consent of the owner' beyond its plain meaning if it were held applicable to cases where the possession is entirely beyond the control of the owner of the goods. Such would appear to be the view taken of the section by the Calcutta High Court in Greenwood* v. *Holquette.*

Does the sub-section apply to the cases contemplated by the Factors' Act of 1877?

"Since the Indian Contract Act became law in 1872, the English Factors' Act of 1877 (40 & 41 Vict., c. 39) has been passed which extends the operation of the earlier Factors' Acts to the case of a purchaser in possession of documents of title of goods, and would, doubtless, have deprived the defendants of their lien after parting with the delivery order.

The Factors' Act of 1877.

"*If the above construction of section* 108 *of the Contract Act be thought inconvenient to the interest of commerce, the remedy is to be*

[1] I. L. R., 8 Bom., 501 (508) [1884].

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found in the extension by the Legislature of the English Act of 1877 *to this country, as was done in the case of the earlier English Factors' Acts.*"

In the recent case of *Biggs* v. *Evans*,[1] a case decided under the earlier Factors' Act,[2] it was held that the defendant was not protected by that Act, since the article in question was not entrusted for sale, but in that case the authority of the agent was limited and payment was not made in the ordinary course of business.

It may perhaps be doubted whether the reasoning in *Greenwood* v. *Holquette* affords any support to the construction adopted in the italicised portion of the judgment in *LeGeyt* v. *Harvey*, and whether that construction is sustainable in the face of the wording of the recent English Factors' Acts which closely resembles that of s. 108.

Its operation illustrated by Johnson v. Credit Lyonnais Co. [1877]. Case of fraudulent sale or pledge by an agent.

The case of *Johnson* v. *Credit Lyonnais Co.*[3] illustrates the class of cases which the Factors' Act of 1877 was intended to meet. One H, a broker in the tobacco trade who also dealt in tobacco as an importing merchant, sold to the plaintiff fifty hogsheads of that article lying in bond in his name in the dock. The plaintiff paid for the tobacco, but in order to avoid the immediate payment of the duty, he left it in bond in the name of H, and left the dock warrants in his hands, taking no step to have any change made in the books of the dock company as to the ownership of the goods. H, being thus the ostensible owner of the tobacco, fraudulently pledged a portion of it to the defendants, and obtained advances, the defendants acting in perfect good faith under the belief,—induced by the fact of H being in possession of the goods and of the documents of title—that H was the real owner. The defendants received the dock warrants from H, and surrendered them to the dock company in exchange for fresh warrants. These transactions were unknown to the plaintiff who, in a suit to recover the value of the goods, was held entitled to succeed on the ground that H was not entrusted by the plaintiff as his factor or agent with the documents of title within 6 Geo. IV, c. 94, s. 2. The Act 40 and 41 Vict., c. 39, was subsequently passed with the view of applying to innocent parties purchasing

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[1] L. R., '94, 1 Q. B., 88, *per* Wills, J.
[2] 6 Geo. IV, c. 94, s. 4.
[3] L. R., 2 C. P. D., 224; L. R., 3 C. P. D., 32 [1877].

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or making advances the protection given by the Factors' Acts to persons acquiring title from agents.

Opinion of the Court.

Cockburn, C. J., in the Court of Appeal[1] referred to the general proposition that the mere possession of property without authority to deal with it otherwise than for the purpose of safe custody, will not, if the person in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent the latter may have been, and then proceeded to examine the authorities, with reference to the doctrines of estoppel and negligence, relied on by the defendants, distinguishing the cases of *Pickering* v. *Busk*,[2] *Boyson* v. *Coles*,[3] and *Dyer* v. *Pearson*,[4] on the ground that in those cases the plaintiffs by their own *express acts* armed the persons in possession with such *indicia* of property as to enable them to appear to all the world as the real owners, and cited the passage in Chitty on Contracts set out in the foot-note.[5] In conclusion the learned Chief Justice expressed himself as follows: "Sitting here as a Court of Appeal I feel myself at liberty to say that these authorities fail to satisfy me that, at Common Law, the leaving by a vendor goods bought, or the documents of title, in the hands of a vendee till it suited the convenience of the former to take possession of them, would, on a fraudulent sale or pledge by the party so possessed, divest the owner of his property, or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by Statute to the unauthorized sale of goods by a factor." The learned Judge was further of opinion that the case was carried no further by the authority of *Pickard* v. *Sears*[6] and *Freeman* v. *Cooke*[7] and subsequent cases, saying that it would be too much to apply the doctrine where

Held that where the buyer for his own convenience left the goods and documents of title in the hands of the seller, who fraudulently resold or pledged them, he could nevertheless recover the goods from the innocent purchaser or pledgee.

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[1] L. R., 3 C. P. D., 32 [1877]. See also *Cole* v. *North-Western Bank*, L. R., 10 C. P., 354 [1875].

[2] 15 East., 38 [1812].

[3] 6 M. & S., 14 [1817].

[4] 3 B. & C., 38 [1824].

[5] "It is said that if the real owner of goods suffers another to have possession thereof, or of those documents which are the *indicia* of property therein, thereby enabling him to hold himself forth to the world as having not the possession only but the property, a sale by such a person without notice will bind the true owner... But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who, *from the nature of his employment*, might be taken *primâ facie* to have had the right to sell." Chitty on Contracts, 10th Ed., 355. This passage is approved in *Higgons* v. *Burton* [26 L. J. (Ex.), 342 (1857)] by the Court of Exchequer.

[6] 6 A. & E., 469 [1837].

[7] 2 Ex., 654 [1848].

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advantage has been taken of a man's remissness in looking after his own interests to invade or encroach upon his rights, in the absence of knowledge on his part of the thing done, from which his assent to it could reasonably be implied.

The learned Chief Justice while holding that the plaintiff upon the above facts was guilty of negligence or wanting in common prudence, a view which he thought supported by the action of the Legislature in enacting the Statute 40 and 41 Vict., c. 39, pointed out that negligence, to have the effect of estopping a party, must be the neglect of some duty cast upon the party guilty of it,[1] and here the plaintiff owed no duty to the defendants which the law could recognise, the case being different to that of a bank's customer who is bound to use due care in drawing a cheque.[2]

Bramwell, L. J., concurred in the above judgment, and Brett, L. J., observed: "Hoffmann was not entrusted by the plaintiff with the possession either of the goods or of the documents of title as an agent for sale or pledge, or in order to carry out any part of a contract of sale or pledge; but, if entrusted as an agent at all, only at the utmost as an agent to hold the goods in custody, and the documents for the purpose of clearing the goods, and forwarding them to the plaintiff or his order on request. Under such a state of facts I am of opinion that the cases of *Fuentes* v. *Montis*[3] and *Cole* v. *North-Western Bank*[4] are conclusive authorities on the construction of the Factors' Acts, and that the transactions of the defendants are not protected by the Factors' Acts. If the plaintiff was guilty of no negligence, and did not give either authority or ostensible authority to Hoffmann to pledge the tobacco, the defendants cannot, I think, be protected by any principle of law independent of the Statutes." And upon the question of negligence the learned Judge thought that the plaintiff had only acted according to the prevailing mercantile practice.[5]

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[1] *Per* Parke, B., in *Freeman* v. *Cooke* [2 Ex., 654; 18 L. J. (Ex.), 114], approved in *Swan* v. *North British Australasian Co.*, by Blackburn, J. [2 H. & C., 175 (181); 32 L. J., (Ex.), 273 (276)], [1864].

[2] See *Young* v. *Grote*, 4 Bing., 253 [1827]. Part I, Chap. VIII, *infra*.

[3] L. R., 3 C. P., 268; L. R., 4 C. P., 93 [1877].

[4] L. R., 9 C. P., 470; L. R., 10 C. P., 354 [1874].

[5] I. L. R., 3 C. P. D., at p. 51 [1877].

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The provisions of the English Statute of 1877 may be summarized as follows :— 40 & 41 Vict. c. 39.

(*a*) The secret revocation of entrustment or agency does not affect the rights of a *bonâ fide* purchaser or lender who has acted upon the faith or security of goods or documents entrusted to an agent.

(*b*) Vendors permitted to retain possession of documents of title are in the position of agents of the vendee and may sell or pledge, provided the purchaser or pledgee has not had notice.

(*c*) The same rule applies to vendees permitted by vendors to retain possession of the documents of title.

(*d*) Documents of title endorsed to any person as vendee or owner may be transferred by such person in favour of a *bonâ fide* purchaser so as to defeat the lien of the original vendor.

But the operation of the Statute by its preamble is limited to the usual and ordinary course of mercantile business.

The Act is now reproduced and somewhat extended by the Factors' Act of 1889. 52 & 53 Vict., c. 45.

The operation of the sub-section is probably to be limited to the case of persons buying or making advances on goods, or documents of title to goods, in the usual and ordinary course of mercantile business.[1] Thus limited it may be doubted whether the intention of the Legislature was not to apply to this country rules similar to those afterwards enacted for England by the Factors' Acts of 1877 and 1889. But the question is not free from doubt.[2] It is, however, difficult to resist the fair inference to be drawn from the language of the section that if the real owner of goods allows another, who from the nature of his employment, or in the ordinary course of mercantile business, must be taken to have the right, to sell the goods or to deal with the documents of title, the owner will be estopped as against a *bonâ fide* purchaser, and that the owner's consent is to be presumed in the absence of evidence to the contrary. *Semble*, the sub-section applies to the usual and ordinary course of mercantile business.

II. The case of a vendor, who has induced a principal or an agent, to act on the belief that only one of them will be held liable, gives rise to an estoppel by election, which is well expressed (*b*) Estoppel by election. Heald *v.* Kenworthy [1855].

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[1] See the preamble to 40 and 41 Vict., c. 39. *Co.* v. *Hanmandass*, I. L. R., 14 Bom., 57 (68) [1889].

[2] See *The Great Indian Peninsular Railway*

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in the words of Parke, B., in *Heald* v. *Kenworthy*[1] : "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal."

The rule is embodied in section 234 of the Contract Act.[2]

Representation as to credit.

In certain cases an election will be implied from conduct. A plaintiff may have alternative remedies against A (a principal) or B (his agent). He elects to sue A to judgment ; he cannot afterwards proceed against B, having abandoned his remedy. Again, he may have made no definite intentional election as to his remedy against either A or B, but his conduct may be held to prevent him from asserting one or other of his remedies. Such cases are based upon the rule of estoppel by conduct having the common feature of a belief, induced by one party to a contract in one or other of two other parties to the same contract, that *credit is being given to* one only of the two, and that the other will not be held liable. An election is implied from conduct on the part of the plaintiff inducing either A or B (as the case may be) to alter his position.

Doctrine of election considered.

The principle of election must first be considered. Where a man has an option to choose one or other of two inconsistent things, when once he has made his election it is final and cannot be retracted.[3] "*Quod semel placuit in electionibus, amplius displicere non potest.*"[4] A man cannot approbate and reprobate at the same time.[5] Where he has determined to follow one of two remedies and has communicated his decision in such a way as to

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[1] 24 L. J., Ex., 76 ; 10 Ex., 739 [1855]. See the remarks of Marriott, J., in *Premji Trikamdas* v. *Madhowji Munji*, I. L. R., 4 Bom. [1880], at p. 457, and see *Thomson* v. *Davenport*, 2 Sm. L. Ca., 9th ed., 395.

[2] IX of 1872. "When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively."

[3] *Scarf* v. *Jardine*, L. R., 7 Ap. Ca., 360 [1881], *per* Lord Blackburn ; see the notes to *Dumpor's case* in 1 Sm. L. Ca., 9th ed., 43, 51.

[4] Co. Lit., 146*a*.

[5] Broom's Legal Maxims, 5th ed., 173, 174, 295 ; *Kerr* v. *Wauchope*, 1. Bligh, 1 [1819].

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lead the opposite party to believe that he has made his choice, and has done an unequivocal act to the knowledge of the persons concerned, that is a conclusive election.[1] But he is not bound to elect at once, he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons.[2]

There can be no election so long as there is a *locus poenitentiae* remaining to the party who has to elect. Thus, the mere act of making and filing an affidavit in bankruptcy where the person so acting was desirous upon consideration of withdrawing it before it was placed upon the file (the act being in fact the inadvertent and unintentional act of his solicitor,) was held not to amount to an election [3] to proceed against an agent, and abandon the remedy against the principal. Where proceedings are taken against an agent by action at law and judgment is obtained (even without satisfaction), that has been held to constitute a conclusive election, but no legal proceedings short of judgment have that effect.[4]

So where a suit against an agent was dismissed on the ground that the plaintiff had given credit to the principal, there was held to be no election.[5] In the same way the insertion of an agent's name in a contract and the fact that payment was demanded of him, the principal being known to the sellers at the time, was held not to amount to an election on the part of the sellers to give credit to the agent alone.[6] The authorities are discussed in *Purmanundass Jivandass* v. *H. R. Cormack*.[7]

The doctrine is one application of the rule of estoppel by conduct.

From one aspect the doctrine of election is an application of the rule of estoppel by conduct, but in this case, as heretofore, it will be necessary to look primarily to the position of the person (either principal or agent) in whose favour the estoppel is sought to be raised.

Position of the other party is chiefly to be considered.

In *Thomson* v. *Davenport* [8] Lord Tenterden and Bayley, J., laid down the rule in somewhat wide terms: "I take it to be a general rule," said Lord Tenterden, "that if a person sells goods

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[1] *Jones* v. *Carter*, 15 M. & W., 718 [1846].

[2] *Clough* v. *London and North-Western Ry. Co.*, L. R., 7 Ex., 34 [1871].

[3] *Curtis* v. *Williamson*, L. R., 10 Q. B., 57 [1874].

[4] *Priestley* v. *Fernie*, 3 H. & C., 977; 34 L. J., Ex., 172 [1865]. See the remarks of Straight, J., in *Bir Bhaddar Sewak Pande* v. *Surju Prasad*, I. L. R., 9 All., 681 [1887], overruled upon another point in P. C., see L. R., 20 I. A., 108, and the notes to *Thomson* v. *Davenport*, 2 Sm. L. Ca., 9th ed., 395.

[5] *Raman* v. *Vairavan*, I. L. R., 7 Mad., 392 [1883].

[6] *Calder* v. *Dobell*, L. R., 6 C. P., 486 [1871].

[7] I. L. R., 6 Bom., 326 [1881].

[8] 9 B. & C., 78 (86) [1829].

(supposing at the time of the contract that he is dealing with a principal), but afterwards discovers that the person with whom he is dealing is not the principal in the transaction but agent for a third person . . . he may afterwards recover the amount from the real principal; subject however to this qualification, that *the state of the account between the principal and the agent is not altered to the prejudice of the principal*. On the other hand, if at the time of the sale the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then according to the case of *Addison* v. *Gandasequi*[1] and *Paterson* v. *Gandasequi*[2] the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." And Bayley, J., said: "Where a purchase is made by an agent, the agent does not of necessity make himself personally liable; but he *may* do so. If he does not make himself personally liable it does not follow that the principal may not be liable, also subject to this qualification, that the principal shall not be prejudiced by being made personally liable, *if the justice of the case is that he should not be personally liable*. If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent."

Thomson v. Davenport [1829].

In the case now cited the agent represented generally to the vendors that he was buying on account of persons resident in Scotland. The vendors did not enquire their names, but claimed subsequently to make the principal liable, and it was held that they were at liberty to do so, as they had not, at the time of the contract, the means of making their election.

In *Heald* v. *Kenworthy*,[3] the plaintiffs sold goods to one Taylor, the defendant's agent, in his own name, treating him as the

Heald v. Kenworthy [1855].

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[1] 4 Taunt., 547 [1812]. [2] 15 East., 62 [1812].
[3] 24 L. J. (Ex.), 76; 10 Ex. 739 [1855].

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principal and supposing him to be the buyer. The defendant pleaded that he had settled in full with Taylor some time after the sale and paid him *bonâ fide* more than sufficient to enable him to satisfy the plaintiff's claim, believing at the time that the persons who had sold the goods had been paid, and that he wa discharged from all liability by reason of his having provided his agent with funds for the payment of the debt. There was no allegation that the vendors by their words or conduct induced the defendant to pay his agent. The Court of Exchequer held that the vendor was at liberty to sue the principal, upon discovering him, unless his doing so would be an *unjust* act, the plaintiff being, under ordinary circumstances, entitled to recover unless he had either deceived the defendant or induced him to alter his position.

Estoppel by conduct.

In that case Parke, B., laid down generally that "if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly," and, after referring to the cases cited in the note,[1] concluded: "I think that there is no authority for saying that a payment made to the agent precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent;" and this opinion was assented to by the rest of the Court.[2]

Armstrong *v.* Stokes [1872], distinction drawn in.

In *Armstrong* v. *Stokes*[3] the Court of Queen's Bench[4] thought that the rule laid down in *Heald* v. *Kenworthy*,[5] if applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be principals and to whom alone the vendor gave credit, would produce hardship. In that case Messrs. Ryder & Co., who bought the goods for the defendants, were commission agents, acting sometimes for themselves and sometimes as agents, and the plaintiffs had never enquired whether they had principals or not, there having been a long previous course of dealing with them. Blackburn, J.,

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[1] *Thomson* v. *Davenport*, 9 B. & C., 78; *Wyatt* v. *The Marquis of Hertford*, 3 East., 147 [1802]; *Kymer* v. *Suwercropp*, 1 Camp., 109 [1807]; *Smyth* v. *Anderson*, 7 C. B., 21 [1849].

[2] Pollock, C. B., & Alderson, B.

[3] L. R., 7 Q. B., 598 [1872].

[4] Blackburn, Mellor and Lush, JJ.

[5] 24 L. J. (Ex.) 76; 10 Ex., 739 [1855].

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in delivering the judgment of the Court said : " We find an exception (always more or less extensively expressed) in the very cases which lay down the rule ; and without deciding anything as to the case of a *broker*, who avowedly acts for a principal (though not necessarily named), and confining ourselves to the present case which is one in which, to borrow Lord Tenterden's phrase in *Thomson* v. *Davenport*,[1] the plaintiff sold the goods to Ryder & Co., ' supposing at the time of the contract he was dealing with a principal,' we think such an exception is established."

A distinction is thus drawn between the case where a seller at the time of the sale supposes the agent to be himself a principal and gives credit to him alone, and one in which he knows that the person with whom he is dealing has a principal behind, though he does not know who that principal is. The latter case occurred in *Irvine* v. *Watson*,[2] where Bramwell, L. J., doubted the distinction, observing : " It is to my mind difficult to understand how the mere fact of the vendor knowing or not knowing that the agent has a principal behind can affect the liability of that principal. I should certainly have thought that his liability would depend upon what he himself knew, that is to say, whether he knew that the vendor had a claim against him, and would look to him for payment in the agent's default."[3]

Doubted in Irvine v. Watson [1880].

In *Irvine* v. *Watson*[4] the Court of Appeal[5] approved *Heald* v. *Kenworthy*, and doubted *Armstrong* v. *Stokes*. There the defendants employed Conning, a broker, to buy palm oil for them, and the plaintiffs sold oil to Conning, being fully aware that he was only an agent buying for undisclosed principals. The terms of the sale were cash on or before delivery, but the evidence showed that it was not the invariable practice in the oil trade to require prepayment. The plaintiffs delivered the oil to Conning without insisting on prepayment, knowing that they had a right against some one else. The defendants paid Conning who failed. In a suit by the plaintiffs to recover the price it was held[6] there was nothing to shew that the plaintiffs had, by their conduct, induced the defendants to believe that they had already been paid

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[1] 9 B. & C., at p. 86 [1829].

[2] L. R., 5 Q. B. D., 103 ; S. C., 414 [1880].

[3] L. R., 5 Q. B. D., at p. 417, 418.

[4] L. R., 5 Q. B. D., 414 (S. C.).

[5] Bramwell, Baggallay and Brett, L. J. J.

[6] Affirming Bowen, J., L. R., 5 Q. B. D., 103.

by Conning, and that, under the circumstances, the plaintiff's omission to insist on prepayment did not amount to such conduct.

Heald v. Kenworthy affirmed.

In the case last cited the learned Judges say that the *dicta* in *Thomson* v. *Davenport*,[1] if construed literally, would operate unjustly to vendors, and were not intended to have a strictly literal interpretation placed upon them, and that *Heald* v. *Kenworthy*[2] more accurately expresses the law. They also concur in holding that the decision in *Armstrong* v. *Stokes*[3] turned upon the peculiar circumstances of the case and might have to be reconsidered.

Estoppel must be made out clearly.

The broad rule that estoppels must be made out clearly will, it is conceived, apply with peculiar fitness in cases of this kind. Where a party who has dealt with an agent has by his conduct led the principal to think that he looked to the agent alone for payment and thereby induced the principal, after the debt has become due, either to pay the agent the amount or allow him to retain it out of the principal's money in his hands, the party so acting cannot afterwards resort to the principal ; but the conduct must be unequivocal. Thus in *Macfarlane* v. *Giannocopulo*[4] where the plaintiff effected an insurance of his ship with the defendant through a broker and, after loss, received a credit note from the broker payable in a month (the broker having at that time sufficient funds of the defendants in his hands), and three months afterwards the broker stopped payment, it was held that there was no conduct on the part of the plaintiff rendering it unjust for him to call upon the defendant for payment.

It has recently been held that where there is a choice of debtors election should be made without delay when a liability is sought to be created by estoppel, and the remedy against the person who ought to pay is likely to be imperilled by delay. In *Fell* v. *Parkin*[5] a creditor who had a choice of debtors attended at a meeting of the creditors of one of them, handed in his claim which was allowed, took the chair at the meeting, and voted against the acceptance of a composition. "The conduct of Robert Fell," said Mathew, J., "at the meeting is as clear and unequivocal as that which was held to be conclusive in *Scarf* v. *Jardine*.[6]

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[1] 9 B. & C., 78 [1829].

[2] 10 Ex., 739; 24 L. J., Ex., 76 [1855].

[3] L. R., 7 Q. B., 598 [1872]. See *Davison* v. *Donaldson*, L. R., 9 Q. B. D., 623 [1882], referring to these cases.

[4] 3 H. & N., 860 [1858].

[5] 52 L. J. (Q. B.), 99 [1882].

[6] L. R., 7 Ap. Cas., 345 [1881].

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CHAPTER VII.

Agency and Partnership.

Estoppel against Principals, Agents, and Partners—The principle to be applied one of agency—Limitation of the estoppel—The estoppel against a principal rests upon the apparent authority of the agent—Contract Act, s. 237—Active misrepresentation not necessary—Inference from conduct proximately connected with agent's acts—General and special authority—Question one of fact—*Spink* v. *Moran* [1874]—Ostensible authority—Liability of third parties dealing with an agent—*Cornish* v. *Abington* [1859]—Third party may be affected with notice of private instructions—Principal may not be bound by mercantile custom—Auction sales—Agent who has induced another to contract upon credit of principal liable upon the ground of warranty or estoppel—Contract Act, s. 235—*Smout* v. *Ilbery* [1842]—*Collen* v. *Wright* [1857]—Implied undertaking by agent—Estoppel against agent occupying fiduciary position—Agent rendering accounts—Person assuming or disclaiming the character of an agent—Joint Hindu family—Estoppel by conduct against members of—Estoppel in the case of partners—Referable to conduct—*Waugh* v. *Carver* [1794]—Contract Act, ss. 245, 246—Classification—Implied authority—Dormant partner must have been known as a member of the firm directly or by notoriety—Election, disavowal of estoppel—*Scarf* v. *Jardine* [1882]—Election not conclusive—Mining partnership—What is a sufficient notice of retirement—Contract Act, s. 264.

Estoppel against principals, agents, partners.

The estoppels which arise in connection with Principal and Agent, and Partners, may conveniently be dealt with together. Where a man holds out another as having authority to act for him in a particular transaction or in a particular course of business, he will be estopped, as against one who has been innocently induced to negotiate with the supposed agent, from disputing the authority of such person to act for him.[1]

The principle to be applied one of agency.

The general principle is well stated by Erle, C. J., in *Ex-parte Swan*:[2] "The principal whose negligence has enabled his agent to cheat a third party acting with ordinary caution is universally estopped from denying the authority of the agent," and instances are given: "A retired partner who has given no notice of dissolution to a customer is estopped from denying the authority of a continuing partner to bind him with that customer. A master, who has accredited a servant to a tradesman to order goods in his

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[1] Bigelow on Estoppel, 5th ed., 565.

[2] 7 C. B. (N. S.), 400 (432) [1859].

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name and has recalled the authority from the servant without giving notice to the tradesman, is estopped from denying the authority of the servant to bind him with such tradesman."

Limitation of the estoppel.

This class of cases depends upon the rule of estoppel by conduct, and it is necessary to state that the act or omission of the principal must be in immediate connection with, or the proximate cause of, the dealing with his agent by the other party. The

Instruments in blank.

large class of cases where instruments in blank[1] have been left in the custody of an agent and fraudulently filled in by him are, as pointed out by Mr. Bigelow,[2] not true cases of estoppel, but cases of agency, or purchaser for value without notice.* "The question," in such cases, observes that learned author, "is simply one of the right to dispute, not the agency altogether, but the extent of the agency—that is, whether the act done was within the admitted agency. *There* lies the line between agency and estoppel. That is not estoppel but agency pure and simple; the agent has only exceeded his instructions." These cases are noticed in the next chapter.

Illustration.

The broad principle which applies both in the case of principals and in the case of partners is illustrated by *Miles* v. *Furber*.[3] There a joint stock company sold their business, that of a furniture depository, to one Beeston, and let the premises to him, authorising the use of their name. The plaintiff, who had before had dealings with the company, deposited furniture with Beeston, believing that the goods were being warehoused with the company, and received a receipt in the name of the company. Beeston failed to pay his rent, and the plaintiff's furniture was seized under a warrant of distress. It was held that the company, having allowed themselves to be held out as the persons with whom the goods were deposited were estopped from distraining as landlords.

Principals.

The case of Principal and Agent has first to be considered, and in this connection will be presented the estoppel against the principal, who, after holding out one as his agent and inducing

Agents.

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* See Illustration (*b*) to s. 237 of the Contract Act (IX of 1872).

[2] Bigelow on Estoppel, 5th ed., 457, 566.

[3] L. R., 8 Q. B., 77 [1873]. The doctrine may also be described as founded upon an implied warranty; see *Cherry* v. *Colonial Bank of Australasia*, L. R., 3 P. C., 24 [1869]. "The warranty which the law implies depends on the position of the parties and the effect of the representation."—p.32.

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Partners.

others to act upon the representation, attempts to deny the agency altogether; and also certain estoppels which affect agents. Later on the estoppel against Partners will be examined.

The estoppel against a principal.

In *Wing* v. *Harvey*,[1] the assignee of a life-policy, which was subject to a condition making it void if the assured went beyond the limits of Europe without license, paid the premium to a local agent of the assurance society at the place where the assurance had been effected, informing the agent that the assured was in Canada. The agent stated that this would not avoid the policy, and received the premiums until the assured died. The Lords Justices held that the society were precluded from insisting on the forfeiture. Knight Bruce, L. J., observed: "How was the plaintiff to know the limits of the agent's authority?" and put the following case:—

"Suppose the agent of a landlord to receive rent, after observing that a breach of covenant had been committed, could the landlord re-enter?"

Rests upon the apparent authority of the agent.

A principal who has by his conduct led other persons to believe that his agent is clothed with a larger authority than that which he actually possesses, where such persons have acted in that belief to their detriment, cannot rely upon any secret limitation of his agent's authority or upon any private understanding he may have with him of which the rest of the world must necessarily be ignorant. "Strangers," said Lord Ellenborough, "can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker, and if a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be assumed that the apparent authority is the real authority. . . It is clear that [the agent] may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not."[2] The principal here does not actually contract, but the person who thought he did has the option of holding him to the consequences of his representations, so that he is precluded from denying that he contracted.[3]

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[1] 5 De G. M. & G., 265 [1854].

[2] *Pickering* v. *Busk*, 15 East, 38 (43) [1812].

[3] See *Freeman* v. *Cooke*, 2 Ex., 654 (663) [1848], *per* Parke, B. See *Miles* v. *McIlwraith*, L. R., 8 Ap. Ca., 120 (133) [1883].

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The rule is laid down in section 237 of the Contract Act.[1]

The rule is enunciated in somewhat narrower terms in *Ramsden* v. *Dyson*.[2] There Lord Cranworth observed: "If, indeed, the principal knows that persons dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal, and knowing this, allows the persons so dealing to expend money in the belief that the agent had an authority, which, in fact he had not, it may be that in such a case, a Court of Equity would not allow the principal afterwards to set up want of authority in the agent. But this equity, whenever it exists, depends absolutely on the fact that the knowledge on which it rests can be brought home to the principal."[3]

Active misrepresentation not necessary.

It is not, however, necessary that the principal should actually know of the state of belief of those who are dealing with his agent. It is enough if they draw from the principal's acts or omissions such inferences as reasonable men would fairly draw. It is not necessary that there should be any positive or deliberate misrepresentation on the part of the principal. His conduct may amount to wilful negligence or to an indifference as to the probable consequences. Indeed the principal and the person who has dealt with his agent may be equally innocent, in which case the familiar rule applies that where, by the fraud or negligence of a third party, one of two innocent persons must suffer, he who entrusted the third party with the means of committing the fraud, must be made liable.[4] It is conceived, however, that the principle last stated is subject to the limitation that the conduct of the principal must be connected proximately with the acts of the agent.

Inference from conduct.

Proximately connected with agent's acts.

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[1] Act IX of 1872: "When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority." See *Brocklesby* v. *Temperance &c. Society*, L. R.' 93, 3 Ch., 130. "Where an owner of deeds has placed them under the control of another and has authorized him to pledge them for a certain sum, and suppose that he has pledged them for more with a person dealing with him *bonâ fide* and without notice of the limit of his authority, can the owner of those deeds redeem them without paying the full amount advanced upon them? The answer to this question is 'No'" *per* Lindley, L. J., at p. 140.

[2] 1 E. & I. A., 129 (158) [1866].

[3] See the remarks of Phear, J., in *Grant* v. *Juggobundo Shaw*, 2 Hyde [1863], at p. 311, where also the definition in Addison on Contracts is cited with approval by Norman, C. J., p. 308.

[4] *Lickbarrow* v. *Mason*, 2 T. R., 63 (70) [1787], *per* Ashurst, J.

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General and special authority.

No distinction is drawn by the Contract Act between general authority and special authority, though the distinction is enunciated in some of the cases.[1] Where a special authority has been given which is exceeded by the agent the principal will not be liable unless he has allowed the agent to put forward an ostensible authority larger than his actual authority. A general authority is, however, by no means an unqualified one, and is merely derived from a multitude of instances, while a special authority is confined to an individual instance.[2] For the purposes of this enquiry it is material to ask not so much whether the authority is general or special as whether an ostensible authority may reasonably be inferred from the circumstances of the particular case.

The question one of fact.

Spink v. Moran [1874].

Spink v. *Moran*,[3] illustrates the rule in this country. There the defendants allowed one Carter, a part proprietor of a tea concern in which they held a share, to manage and conduct the affairs of the tea estates for many years, money to carry on the business being provided by means of bills drawn upon Carter in the same manner as if he had been the sole owner, the defendants being aware of this fact and finding the necessary funds. Carter, without the defendants' knowledge, procured advances from the plaintiffs on the security of the outturn of the year 1872, and applied the money to his own private uses. The plaintiffs believed Carter to be the proprietor of the concern and not merely the manager. In a suit to recover a balance due on account of their later advances, Couch, C. J., held (Phear, J., dissenting) affirming the decision of Macpherson, J., in the Lower Court, that the

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[1] See the remarks of Pollock, C. B., in *Reynell* v. *Lewis*, 15 M. & W., 527 [1846].

[2] *Per* Lord Ellenborough, in *Whitehead* v. *Tuckett*, 15 East, 400 (408) [1812].

[3] 21 W. R., 161 [1874]. The following cases were cited:—*Pickering* v. *Busk* [15 East., 38 (1812)], *Trueman* v. *Loder* [11 R. & E., 589 (1840)]; and the question was much discussed whether the obtaining advances against the tea produced was a common and ordinary incident to the business carried on by proprietors of tea gardens, and *Dickinson* v. *Valpy* [10 B. & C., 128 (1829)] was relied on. Macpherson, J., thought a tea garden was more in the nature of a West Indian Estate [see *Chambers* v. *Davidson*, L. R., 1 P. C., 296 (1866)], or an Australian sheep farm [see *Ayer* v. *The South Australian Banking Co.*, L. R., 3 P. C., 548 (1871)]. In the Appeal Court, Phear, J., dissented with hesitation, citing *Pickard* v. *Sears* [6 A. & E., 474 (1837)]; *Freeman* v. *Cooke* [2 Ex., 663 (1848)]; *Swan* v. *North British Australasian Co.* [2 H. & C., 175 (1863)]; *Evans* v. *Bicknell* [6 Ves., 174 (1801)]; *West* v. *Reid* [2 Ha., 257 (1843)] chiefly on the ground that there had been no actual misrepresentation or concealment of the truth, or negligence amounting to fraud, on the part of the defendants, and that mere simple negligence and abstaining from enquiry was not enough. This enumeration of estoppels is, however, imperfect.

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plaintiffs were entitled to recover. "It appears to me," said Chief Justice, "that the question in the case is whether this transaction was within the scope of the authority which Carter had, or was allowed by his partners to appear to have, in managing and conducting the affairs and business of the partnership. The agreement, I think, impliedly authorized him to conduct and manage the matters and affairs of the estates in his own name, and as if he were the owner. It was to be subject to the assent and approval of his co-partners; but the public would have no notice of this, and the persons dealing with him would not be bound to ascertain whether what he was doing was assented to by his partners. There was no provision that the business of the cultivation of the tea gardens and disposal of the produce should be carried on in their names or in the name of a firm, so that the public would have notice that Carter was not the sole owner. . . . I think it is most probable that it was the intention of all parties that Carter should continue to conduct and manage the affairs and business of the tea gardens as if he had not parted with the half share and had continued to be the sole owner. . . . It is a question of actual or apparent authority, and whether the transaction was one which the owner of a tea garden, carrying on the cultivation of it, would in the ordinary course of business enter into." [1] Ostensible authority.

In *Trickett* v. *Tomlinson* [2] the plaintiff informed the defendants that he had authorised an agent to see them, and, if possible, to come to some amicable arrangement as to the price of certain granite. The agent agreed with the defendants on behalf of the plaintiff that they should have the granite for £50. The plaintiff sought to repudiate the agent's act on the ground that he had given him secret instructions not to take less than £100. Erle, C. J., held that the plaintiff, having held out the agent to the defendants as a person duly authorised to settle the matter in dispute at his discretion, should not be allowed to turn round and repudiate that authority. Illustrations.

In *Waller* v. *Drakeford* [3] the plaintiff, under the mistaken belief that one B was her husband, constituted him her agent to sell

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[1] 21 W. R., at p. 177.

[2] 13 C. B. (N. S.) 653 [1863]. See Illust. (*a*) to s. 237 of the Contract Act (IX of 1872).

[3] 1 El. & Bl., 749 [1853].

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goods, and represented him to the defendant as having authority. It was held that she could not dispute the sale.

In *Montagu* v. *Forwood*[1] the plaintiffs employed Beyts and Craig to collect a debt. The latter not being brokers employed the defendants, who supposed Beyts and Craig to be the principals in the transaction, and proceeded to set off against the money collected by them a debt due to them by Beyts and Craig. It was held they were entitled to do so. "If," said Bowen, L. J.: "A has allowed his agent B to appear in the character of a principal he must take the consequences."

An agent commissioned by a vendor to find a purchaser has authority to describe the property, and to state any fact or circumstance which may affect the value, so as to bind the vendor; and if an agent so commissioned, makes a false statement as to the description or value (though not instructed to do so) which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance. So if a man employs another to let a house for him; that authority empowers the agent to describe the property truly, to represent its actual situation and, if he thinks fit, to represent its value,[2] and the

General rule.

general rule appears to be that a master is answerable for every act of his servant or agent within the scope of his ostensible authority committed in the course of his employment, although no express command or privity of the master be proved.[3] But where an auctioneer, without authority and acting entirely upon an inference drawn by him from the appearance of the premises, erroneously makes a *bonâ fide* representation enhancing the value of the premises, and the bidders are put upon enquiry by the terms of the conditions of sale, it has been held that, although the evidence of what passed at the time of sale is admissible against the vendor, no action will lie against him to recover compensation for the innocent misrepresentation.[4]

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[1] L. R., '93, 2 Q. B., 350.

[2] *Mullens* v. *Miller*, L. R., 22 Ch. D., 194 [188:], *per* Bacon, V. C.

[3] *Mackay* v. *Commercial Bank of New Brunswick*, L. R., 5 P. C., 394 [1874]; *Barwick* v. *English Joint Stock Bank*, L. R., 2 Ex., 259 [1867]; *Swire* v. *Francis*, L. R., 3 Ap. Ca., 106 [1877]; *Eaglesfield* v. *Marquis of Londonderry*, L. R., 4 Ch. D., 693 (708) [1876]; *Chapleo* v. *Brunswick Building Society*, L. R. 6 Q. B. D., 696 [1881]; and see Contract Act (IX of 1872), s. 238.

[4] *Brett* v. *Clowser*, L.R., 5 C.P.D., 376 [1880]. See also this case as to the effect of general words in a lease, and the estoppel which may arise in connection with a right of way.

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Liability of third parties to principal.

The same rule applies to third persons dealing with an agent and making him their agent for the purposes of the transaction.

Where a contract of sale was signed by an auctioneer "as agent for the vendor," and the purchaser paid a deposit, knowing at the time that the vendor's name did not appear in the memorandum of agreement, it was held that the purchaser could not treat the contract as invalid upon that ground. In *Thomas* v. *Brown*,[1] Mellor, J., considered that such a case came within the rule laid down by Pollock, C. B.. in *Cornish* v. *Abington*,[2] and said: "I think this is an express authority which quite justifies us in holding that it does not lie in the mouth of the vendee, who has accepted a contract like this, afterwards to reject it."

Inference from conduct. Cornish *v.* Abington [1859].

In *Cornish* v. *Abington*[3] one Gower, the plaintiff's foreman, being prohibited to do printing on his own account, agreed with the defendant, a publisher, to supply maps to him, and entered an order as from the defendant in the plaintiff's book. The defendant received maps from the plaintiff's premises, some of them accompanied by delivery notes requesting the defendant to receive goods from the plaintiff, and the defendant signed receipts to this effect, and accepted bills and gave cash to Gower in respect of an account made out in the plaintiff's name. The jury found that the defendant did not authorise Gower to use his name, but that the defendant had so acted as to lead the plaintiff to believe that he was dealing with the defendant. The defendant was held liable.

Third party may be affected with notice of private instructions.

A third party may, under some circumstances, be taken as affected with notice of private instructions.

In *Baines* v. *Ewing*[4] the defendant authorised an insurance broker at Liverpool to "underwrite policies of insurance against marine risks not exceeding £100 by any one vessel." The broker subscribed a policy for £150. It appearing that a limit was always known to exist to the amount for which a broker may underwrite, the Court of Exchequer held that the defendant had

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[1] L. R., 1 Q. B. D., 714 (722) [1876].

[2] "If any person by actual expressions or by a course of conduct so conducts himself that another may reasonably infer the existence of an agreement or license, and acts upon such inference, whether the former tends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."—4 H. & N., 556.

[3] 4 H. & N., 549 [1859].

[4] L. R., 1 Ex., 320 [1866].

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only held out his agent as having the ordinary authority of a Liverpool broker, and that it would be impossible to hold the defendant liable to an unlimited extent, the broker having exceeded his special authority.

Principal may not be bound by mercantile usage.

In *Sweeting* v. *Pearce*[1] the plaintiff employed a broker to make an adjustment with the underwriter in respect of the loss of a ship. The loss was settled in accordance with a usage at Llyod's (which, however, was not known to the plaintiff,) by the underwriter setting off the amount payable by him upon the policy against the balance due to him by the broker for premiums upon other policies. It was held that, assuming that there was an estoppel against the plaintiff, he was not bound by the usage.

Auction sales.

It has been held that the mere fact of sending a broker or agent to an auction to bid for a particular article or to bid a particular price cannot be considered as conduct inducing third persons to believe that he had a general authority to buy, and the principal is not liable to take and pay for every article which the agent may think fit to bid for.[2] But ratification of an agent's acts may be implied from the conduct of the person on whose behalf the acts are done.[3]

An agreement in person to purchase property at an auction-sale by signing the contract and paying the deposit will, however, preclude the person so acting from disputing the validity of the sale.[4]

The estoppels against Agents have now to be considered.

Agent who has induced a third party to contract upon

Where a person induces others to contract with him as the agent of a principal by an unqualified assertion that he is authorised to act as such agent, he is answerable to the person who

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[1] 9 C. B. (N. S.), 534 [1861]. It would seem that an underwriter who has a right to avoid a contract of insurance may be estopped if he does not elect to do so, and the other party in the meantime alters his position. See *Morrison* v. *The Universal Marine Insurance Co.*, L. R., 8 Ex. 197 (205, 206) [1873]; see also as to the effect of accepting notice of abandonment; *Provincial Insurance Co.* v. *Leduc*, L. R., 6 P. C., 224 (243) [1874]; *Hudson* v. *Harrison*, 3 Brod. & Bing., 97 [1821]. For the purposes of the contract of insurance and all rights arising from the contract, the valuation in a valued policy is conclusive, but not for purposes collateral to the contract, see *Burnand* v. *Rodocanachi*, L. R., 7 Ap. Ca., 333 (335) [1882].

[2] *Mackenzie Lyall* v. *Moses*, 22 W. R., 156 [1874].

[3] Contract Act (IX of 1872), s. 197.

[4] *Else* v. *Barnard*, 6 Jur. (N. S.,) 621 [1860].

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so contracts for any damages he may sustain by reason of the authority being untrue, and the fact that the professed agent honestly thinks he has authority in no way assists him.[1]

credit of principal liable on the ground of warranty or estoppel.

The rule, which is to be found in section 235 of the Contract Act[2] may, it is conceived, be referred to an estoppel as well as to an implied warranty of authority.[3]

In *Smout* v. *Ilbery*,[4] the cases in which an agent has been held personally liable are arranged in three classes. "In all of them it will be found that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act." This classification, it is submitted, brings the present class of cases within the definition of estoppels in *Carr* v. *London and North-Western Railway Co.*[5]

Smout *v.* Ilbery [1842].

In *Collen* v. *Wright*,[6] the plaintiff sued the personal representatives of one Wright, who professing to act as the agent of one Gardner, but having in reality no authority, entered into an agreement with the plaintiff for the lease from Gardner to him of a farm. The plaintiff was not aware that Wright had no authority from Gardner, and he went to considerable expense in preparing the farm for cultivation. Wright persisted that he had authority from Gardner, and said he would be responsible if a Chancery suit against Gardner to enforce the contract failed. The Court of Exchequer Chamber held, affirming the decision of the Court of

Collen *v.* Wright [1857].

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[1] *Per* Willes, J., in *Collen* v. *Wright*, 27 L. J. (Q. B.), 215 (217) [1857].

[2] IX of 1872, s. 235: "A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing." In *Hasanbhoy Visram* v. *H. Clapham*, I. L. R., 7 Bom., 51 (66) [1882], this section is stated to be in accordance with the English law as established by *Collen* v. *Wright*, and the other cases cited in Smith's Leading Cases in *Thomson* v. *Davenport*, Vol. ii, p. 413, 9th ed.

[3] "When a person in error assumes that he has authority to make a contract for a principal when he is not really his principal he warrants that he had that authority which he represented himself to have. The contract is only a contract to the extent of the authority. That is clearly shown by *Collen* v. *Wright*." *Per* Brett, M. R., in *In re National Coffee Palace Co.*, L. R., 24 Ch., 364 (371) [1883]. See this case, and *Meek* v. *Wendt*, L. R., 21 Q. B. D., 126 [1888], as to the measure of damages in such cases.

[4] 10 M. W., 1 (10) [1842].

[5] L. R., 10 C. P., 307 [1875].

[6] 27 L. J. (Q. B.), 215 [1857].

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Queen's Bench, that the plaintiff was entitled to recover from Wright's representatives the costs of the Chancery suit.

Implied undertaking by agent.

"The obligation in such a case," said Willes, J., "is well expressed by saying that the person, professing to contract as agent for another, impliedly undertakes[1] with the person who enters into such a contract upon the faith of his being duly authorised, that the authority he professes to have does in point of fact exist."

In *Mohendro Mookerjee's case*[2] one MM, an overseer of or for the Municipal Office, was sued for money due under a contract made by him with the plaintiff on behalf of the Municipality, the work being known to both parties to be Municipal work, and the defendant representing that he had authority to contract as the agent of the Municipality. It was held that the contract being a *quasi* contract, the defendant could not be held personally liable in an action of contract, and that the plaintiff could not be allowed to amend his plaint so as to make the defendant liable in tort for misrepresentation of his authority. This case would probably have been differently decided under section 235 of the Contract Act.

Other cases of estoppel upon agents may be here mentioned.

Estoppel against agent occupying fiduciary position towards principal.

In *Harris* v. *Truman*[3] one Fairman, who was employed by the defendants as their malting agent to purchase and malt barley for them exclusively, bought barley and malt upon credit, and drew funds of the defendants' from certain banks, representing to the defendants that the money so drawn was being used for the purchase of barley approved of by them. These funds he misapplied for his own purposes, and eventually absconded, leaving malt and barley upon the malting premises of less value than the funds misappropriated by him. The defendants seized the malt and barley before Fairman was adjudicated a bankrupt. In a suit by his trustee in bankruptcy to recover the value, it was held that

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[1] The judgment of Cockburn, C. J., (who dissented) is instructive as showing the reluctance with which "the fiction of an implied contract, creating a new species of liability" came to be recognised in cases of this kind: *Collen* v. *Wright* has been followed in numerous cases. See *Cherry* v. *The Colonial Bank of Australasia*, L. R., 3 P. C., 24 (32) [1869]; *Richardson* v. *Williamson*, L. R., 6 Q. B., 276 [1871]; *Weeks* v. *Propert*, L. R., 8 C. P., 427 [1873]; *Dickson* v. *Reuter's Telegram Co.*, L.R., 3 C. P. D., 1 [1877]. See *Chapleo* v. *Brunsrick Building Society*, L. R., 6 Q. B. D., 696 [1881].

[2] 9 W. R., 206 [1868].

[3] L. R., 9 Q. B. D., 264 [1882] (S. C.); L. R., 7 Q. B. D., 340.

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the relation created by the course of business between Fairman and the defendants was that of principal and agent, that the barley and malt were not in the order and disposition of Fairman as the reputed owner, it being notorious that malting agents are in many instances not the owners of the malt and barley on their premises; and, further, that the funds drawn out by Fairman were impressed with a trust in favour of the defendants, so that even if the property in the malt and barley was not vested in the defendants but in Fairman, nevertheless Fairman could not have been heard to allege that the barley was bought otherwise than according to the authority given him by the defendants, and his trustee in bankruptcy could be in no better position.

Agent rendering accounts.

An agent may, under certain circumstances, be estopped as against his principal by furnishing accounts appropriating specific sums in payment of specific items.[1]

Person assuming the character of an agent,

In *Lokhee Narain Roy Chowdhry* v. *Kallypuddo Bandopadhya*[2] the question was whether an auction purchase had been made by one Ishan Chunder on his own account or on behalf of one Lokhee Narain. Ishan Chunder had been for some years the manager of Lokhee Narain, and as such had advanced funds to Monmohinee, the judgment-debtor, whose life interest in nine annas of an estate in which Lokhee Narain held the remaining seven annas and also the reversion, was for sale. Ishan Chunder had no express instructions to purchase previous to the sale, and one Russool having bid for the property on behalf of Lokhee Narain, it was suggested that Ishan Chunder was the proper person to purchase for the zemindar. He accordingly came into the room and made an advance of Rs. 2 upon the previous bidding of Russool, and the property was knocked down to him, but neither he nor his sons obtained anything more than formal possession. Lokhee Narain received the rents and paid the Government revenue, but on Ishan Chunder's death his sons claimed the property. The Privy Council were of opinion, reversing the decisions of the Lower Courts, that it would be contrary to equity to allow a man who had stepped in and assumed the character of a principal agent, deposing another who was really acting as agent, to turn round and say that

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[1] See *Van Hasselt* v. *Suck*, 13 Moo. P. C., 185 [1859]. See Part I, Chapter X, *infra*.

[2] 23 W. R., 358; L. R., 2 I. A., 154 [1875].

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he had purchased for himself and not for his principal, and thus obtain a profit.

or disclaiming.

Where an agent has disclaimed all interest on his own account, he cannot afterwards set up a title on his own account.[1]

Joint Hindu family.

The ratification of an unauthorised contract of an agent can only be effectual when the contract has been made by the agent avowedly for or on account of the principal, and not when it has been made on account of the agent himself.[2] So where the defendant had promised his adoptive mothers to redeem certain mortgages executed by them to the plaintiff subsequent to his adoption, and allowed the plaintiff to carry out the provisions of the mortgage-deeds to his own detriment by paying maintenance to the widows and by paying off certain previous mortgages, it was held by the Bombay Court that knowledge and acquiescence on the part of the defendant did not raise any estopppel in the plaintiff's favour, it being no part of the defendant's duty to step in and protect the plaintiff against the consequences of his own unauthorised dealings with the property.[3]

Estoppel by conduct against members of Hindu family.

So the common incident of one member of a joint Hindu family selling or purchasing property on behalf of the family does not constitute him their agent so as to make a sale by him binding on the other members.[4] But where they have held out one of their number as manager of the whole estate in such a manner as to induce outsiders dealing with him to believe that he had authority to mortgage their whole interest, they may by their conduct be estopped from denying that the mortgage is binding on their shares.[5]

Estoppel in the case of partners.

The estoppel in the case of Partners has next to be considered. Where a man holds himself out as a partner or allows others to use his name, he is estopped from denying his assumed character upon the faith of which creditors may be presumed to have acted, and becomes a partner by estoppel.[6]

Referable to conduct.

The liability of one who has permitted others to suppose that he is a member of a firm has frequently been stated to depend

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[1] *Seshayyar* v. *Pappuvaradayyangar*, I. L. R., 6 Mad., 185 [1882].

[2] *Wilson* v. *Tumman*, 6 M.&Gr., 236 [1843].

[3] *Shiddeshvar* v. *Ramchandrav*, I. L. R., 6 Bom., 463 [1882].

[4] *Bhujonanund Mytee* v. *Radha Churn Mytee*, 7 W. R., 334 [1867].

[5] *Krishnaji Mahadev Mahajan* v. *Moro Mahadev Mahajan*, I. L. R., 15 Pom., 32, [1890].

[6] *Per* Sir Montague Smith in *Molloy March* v. *Court of Wards*, L. R., 4 P. C. 419, (435) [1872].

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upon agency, whether he has in fact made the person or persons who actually entered into the contract his agent or agents for the purpose of entering into that particular contract. The law of estoppel as to partners is no doubt in one aspect a branch of the law of principal and agent,[1] and it will be useful to bear this in view. But it is more accurate to refer the liability to the duty cast upon the person liable arising from his conduct. The liability of a late partner for debts of the continuing firm to customers who have not received notice of its dissolution rests, not upon the ground that the authority given by the late partner actually continues, but upon the ground that there is a duty upon a person who has given an authority, if he revoke it, to take care that notice of that revocation reaches those who might otherwise act upon the supposition that it continued, and the failure to give that notice precludes him from denying, against those who act upon the faith that that authority continued, that he gave the authority.[2]

Waugh *v.* Carver [1794].

The ground of the estoppel has been well stated by Eyre, C. J., in *Waugh* v. *Carver* :[3] "If he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they only lent it to two of them, to whom, without the others, they would have lent nothing." The principle may be more concisely stated by saying that the estoppel is founded upon *credit* being given to the person charged.

Credit is given to him as a partner.

The rule as to the liability of partners dormant and ostensible, continuing or retired, is stated in sections 245 and 246 of the Contract Act,[4] and the notice requisite to persons dealing with

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[1] *Per* Garth, C. J., in *Chundee Churn Dutt* v. *Eduljee Cowasjee*, I. L. R., 8 Calc., 678 (684) [1882].

[2] *Per* Lord Blackburn, in *Scarf* v. *Jardine*, L. R., 7 Ap. Ca., 345 (357) [1882].

[3] 1 Sm. L. Ca., 9th ed., 877 (893). See *Dickenson* v. *Valpy*, 10 B. & C., 140 [1829], and the remarks of Parke, J.

[4] Act IX of 1872, section 245: "A person who has by words spoken or written or by his conduct led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm." Section 246: "Any one consenting to allow himself to be represented as a partner, is liable, as such to third persons who, on the faith thereof, give credit to the partnership." For cases before the Contract Act, see *Shewram* v. *Rohomutoollah*, W. R., 864, 94; *Gunga Ram* v. *Gunga Dhur*, 1 Agra, 198 [1866].

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the firm sufficient to discharge such liability is referred to in section 264.[1]

Classification. The estoppels may then be classified as follows :—

i. While a firm is in course of formation no representation that a person intends to become a partner can give rise to an estoppel.[2]

ii. During the continuance of a partnership a person may become liable by representing himself as, or allowing himself to be represented as, a partner, either (*a*) by name, or (*b*) without his name being disclosed, even though he is not a partner at all.[3]

iii. After dissolution of partnership a retiring partner may be liable by allowing third persons to contract with the new firm upon the credit of his name, although as regards the firm he has ceased to be a partner.

Holding out. The question, whether there has been a holding out or not, is one of fact, whether in the particular case express authority has been given by, or implied authority may be inferred from the conduct of, the person sought to be charged. The rule to be applied in these cases is identical with that noticed above in the case of a principal. It is not necessary that the partner should, to the knowledge of the creditor, be participating in the profits of the firm, or indeed, participating in profits at all. His liability may even remain, although there is an express agreement between himself and his co-partners that he shall not be liable, his name being expressly or impliedly lent to the firm for the purpose of obtaining credit.[4]

Implied authority.

But in order to render him liable it is necessary that he should have been known as a member of the firm either by direct transactions, or by notoriety.[5] As regards the firm itself he may have given no direct authority ; but if he has by his conduct represented

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[1] Section 264 : "Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution." This section is not intended to be an exhaustive exposition on the question of notice of dissolution of partnership. See *Chundee Churn Dutt* v. *Eduljee Cowasjee*, I. L. R., 8 Calc. 978 [1882].

[2] See p. 32 *supra*, and *Mollowo March* v. *Court of Wards*, L. R., 4 P. C., 419 (435) [1872] ; *Bourne* v. *Freeth*, 9 B. & C., 632 [1829] ; *Reynell* v. *Lewis*, 15 M. & W., 517 [1846].

[3] See *Gurney* v. *Evans*, 3 H. & N., 122 [1858] ; *Ex parte Hayman*, L. R., 8 Ch. D., 11 [1878].

[4] See the subject fully discussed in Lindley on Partnership, 5th ed., 40—47 ; Pollock, Digest of the Law of Partnership, 26—29.

[5] *Evans* v. *Drummond*, 4 Esp., 89 [1801].

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himself to be a partner and induced others to give credit to him as such, he will be answerable to them for the consequences of his original representation, uncontradicted by notice of his retirement.[1] If the fact of his being a partner has become known to any person or persons either by general report or direct communication he would be in the same situation, as to all such persons, as if the existence of the partnership had been notorious.[2]

Dormant partner must have been known as a member of the firm directly or by notoriety.

But a creditor, A seeking to charge an ostensible partner B, must at least shew that B was a partner by notoriety, or that the fact of B being regarded as a partner has come to his knowledge, and that he acted in consequence of it. There must be some evidence of holding out which must be shewn to have reached the plaintiff.[3]

In *Price* v. *Groom*[4] where one Wiggins, a horse dealer, assigned his stock-in-trade to trustees for the benefit of his creditors, and was allowed by them to carry on business on his own account, and he accordingly dealt with the defendants and afterwards became bankrupt, it was held that there had been no partnership between Wiggins and the trustees. "If," said Parke, B., "the trustees had represented to the creditors that the bankrupt was really the party interested in the business, and upon that representation the creditors had dealt with him, they might perhaps have been estopped from afterwards setting up a different state of facts; but that is not the case here."

In *Scarf* v. *Jardine*[5] the rule of estoppel was qualified by the application of the doctrine of election. In that case two partners, S and R, dissolved partnership in July 1877, and R carried on the old business with one B under the same name and at the same place. The new firm, in January 1878, ordered goods of the plaintiff which were supplied in February, in which month he first became aware that the old firm had been dissolved. He continued to supply goods to the firm until July 1878, looking to the members of the new firm for payment. In that month a cheque drawn by R and B was dishonoured, and the plaintiff then commenced an action against them for (amongst other goods) those supplied before

Election; disavowal of estoppel.

[1] *Carter* v. *Whalley*, 1 B. & Ad., 11 (14) [1830].

[2] *Farrar* v. *Deflinne*, 1 Car. & Ker, 580 [1843].

[3] *Edmundson* v. *Thompson*, 31 L. J. (Ex.) 207 [1861].

[4] 2 Ex., 642 (548) [1848].

[5] L. R., 7 Ap. Ca., 345 [1882].

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notice of the dissolution of the partnership reached him. On the new firm going into liquidation the plaintiff proved as a creditor. After the liquidation and the proof, the plaintiff sued S in respect of these goods. The House of Lords held, reversing the decision of the Court of Appeal, that the liability of S, the late partner, was a liability by estoppel only, and not jointly with the members of the new firm, and that the plaintiff having elected to proceed against the new firm could not hold the late partner liable upon the ground of estoppel.

Election not conclusive.

In *Ex-parte Adamson*,[1] *In re Collie*, the majority of the Court of Appeal held that, where a partnership debt has been incurred by means of a fraud on the part of the partners, the defrauded creditor has a right to prove at his election against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners, and that a creditor having such a right of election does not lose it merely by proving and receiving a dividend, but may change his election on refunding the dividend with interest.

Mining partnership.

Cases have arisen in England in connection with mines "where the property is of a very precarious description, sudden emergencies arising which require an instant supply of capital, and in which the faithful performance of engagements is absolutely necessary for the prosperity and even the existence of the concern[2]." Under these circumstances, where a partner stands by and watches the progress of the adventure to see whether it is prosperous or not, determining to intervene only in case the affairs of the mine should turn out prosperous, but determining to hold off if a different state of things should exist, Courts of Equity have said that he is to receive no encouragement, and, his conduct being inequitable, he has no right to equitable relief.[3] The distinction drawn in these cases has been between executory[4] and executed[5] interests. In the former case a party excluded from the profits of an adventure must apply for relief without delay. In the latter case a party may, by standing by, waive and abandon his rights, but there

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[1] L. R., 8 Ch. D., 807 [1878].

[2] *Clarke* v. *Hart*, 6 H. L. Ca., 633 (656) [1858] *per* Lord Chelmsford. See *Rule* v. *Jewell*, L. R., 18 Ch. D., 660 [1881].

[3] *Clarke* v. *Hart*, at p. 656.

[4] See the cases cited in *Clarke* v. *Hart*, 6 H. L. Ca., at p. 657.

[5] *Prendergast* v. *Turton*, 1 Yo. & Col., 98 ; (S. C.) 13 L. J. (Ch.), 268 [1844].

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must be a case of estoppel made out against him.[1] Such cases have not arisen in India, where it would seem that a partner cannot be excluded without an order of Court,[2] or a dissolution of the partnership ;[3] and it is sufficient to say that, should such cases arise here, an intention on the part of a partner to abandon an undertaking will probably be presumed from his conduct and course of dealing.[4]

What is a sufficient notice of retirement.

In *Chundee Churn Dutt* v. *Eduljee Cowasjee*,[5] the question of sufficiency of notice[6] was much discussed. It was there held that the Official Gazette in Calcutta does not occupy the same position as the *London Gazette*, the latter being the usual and almost invariable mode of advertising new partnerships, dissolutions of partnership, and similar news ; whereas the *Calcutta Gazette* deals principally with official matters, and has little circulation in the commercial world. The Court held that the question of sufficiency of notice, whether public or otherwise, was one rather of fact than of law ; that it might be a question of law, to what sort of notice any particular customer or class of customers, is entitled ; but how far in each case such notice may have been actually given is generally a question of fact. That in the case of old and known customers of the firm an express or specific notice by circular or otherwise should be given ; but as regards the general public (specific notice being impossible), the most effectual public notice which can reasonably be given is sufficient ; and what is sufficient public notice must depend upon circumstances, upon the locality, and whether there are any and what newspapers in circulation there, or upon what are the usual means of giving public notice in the neighbourhood.[7]

In the above case section 264 was considered and various explanations of its meaning suggested.[8] The Court held that it was

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[1] *Clarke* v. *Hart*, 6 H. L. Ca., 633 (658, 659).

[2] Contract Act (IX of 1872), s. 253 (9).

[3] Contract Act (IX of 1872), s. 253 (7).

[4] *Ib.*, s. 252.

[5] I. L. R., 8 Calc., 678, (684) [1882], Garth, C. J., and White, J.

[6] "Persons dealing with a firm will not be affected by a dissolution, of which no public notice has been given, unless they themselves had notice of such dissolution." Contract Act (IX of 1872), s. 264. See Act IV of 1882, s. 93. (*c*).

[7] Lindley on Partnership, 5th ed., 221—223 ; Smith's L. Ca., 9th ed., Vol. i (904, 5).

[8] See *per* Garth, C. J., in *Chundi Churn Dutt* v. *Eduljee Cowasjee*, I. L. R, 8 Calc., 678 (683. 4).

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not an exhaustive exposition of the law. In *Ramasami* v. *Kadar Bibi*[1] the case of a dormant partner came before the Madras Court. The plaintiffs were not old customers, and the Court held that it would lie upon them to aver and prove that they commenced dealings with the firm on the strength of their belief that defendant No. 1 (a Mahomedan lady) was a partner. "The retirement of a dormant partner," said Collins, C. J., "is an exception to the usual rule that a partner's agency ends by notice,[2] and it was not averred that appellants knew defendant No. 1 to be a dormant partner, notwithstanding that her name did not appear in the designation of the firm. An old customer might possibly be supposed to have known the fact, but there would be no such presumption in the case of a new customer."

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[1] I. L. R., 9 Mad., 492 [1886].

[2] See Lindley on Partnership, 5th ed., 212, 213; also *Carter* v. *Whalley*, 1 B. & Ad., 11 [1830]; *Heath* v. *Sansom*, 4 B. & Ad., 172 [1832]; *Evans* v. *Drummond*, 4 Esp., 89 [1801], there referred to, and *Western Bank of Scotland* v. *Needell*, 1 F. & F. 461 [1859], distinguished.

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CHAPTER VIII.

NEGOTIABLE INSTRUMENTS.

Classification—Peculiar character of negotiable instruments—Derived from the law merchant—Implied contract—Representation involved—Contract may be express—Position of the parties defined by law—Statutory estoppels—Acceptor—Provisions of the law as to—Position of other parties to negotiable instruments—Inchoate instruments—Rule for protection of innocent transferees for value—Extension of the rule in *Wahidunnessa* v. *Surgadass* [1879]—A case of estoppel by negligence or by apparent authority—The case of inchoate instruments appears to rest upon the ground of negotiability—Case of cheque carelessly drawn—Bill ineffectually cancelled—Where fraud intervenes there must be proximate negligence on the part of the principle—*Arnold* v. *The Cheque Bank* [1876]—Lost or stolen instrument—*Baxendale* v. *Bennett* [1878]—Act XXVI of 1881, s. 58—Cases of agency—Instrument put in circulation by fraud of agent—*Goodwin* v. *Robarts* [1876]—*Rumball* v. *Metropolitan Bank* [1877]—*Colonial Bank* v. *Hepworth* [1887].—*Bank of England* v. *Vagliano Brothers* [1891]—*France* v. *Clark* [1884]—Person taking documents of value from an agent known to have limited authority—*Sheffield* v. *London Joint Stock Bank* [1888]—*Colonial Bank* v. *Cady* [1890]—Adoption of forged signature—Estoppel by conduct—*Mackenzie* v. *British Linen Co.* [1881]—A mere acceptance affords no presumption of authority—*Morris* v. *Bethell* [1869]—Post-office orders—Documents negotiable by custom—Railway Receipts.

Classification.

ESTOPPELS, in connection with negotiable instruments, require to be distinguished, as the use of the term has led to no little confusion of thought. On the one hand, the peculiar character of a negotiable instrument, derived from the law merchant, requires to be considered. On the other hand, certain estoppels properly so called are to be explained by reference to the doctrines of negligence or agency.

Peculiar character of negotiable instruments.

First as to the nature of a negotiable instrument. "The law of negotiability," observed Baron Wilde in *Swan* v. *North British Australasian Co.*,[1] "is the law of property passing by delivery. It gives to actual transfer the effect of real title. The law merchant validates, in the interests of commerce, a transaction which the Common Law would declare void for want of title or authority, and transactions within its operation are

[1] 7 H. & N. 603 (634) [1862].

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as absolutely valid and effectual as if made with title or authority."[1]

Derived from the law merchant.

The term "estoppel" is generally used in connection with the legal position which the parties to bills or notes occupy relatively to one another, but the subject appears to be intimately connected with the application of two principles, first, that in the case of such instruments the law looks chiefly to the nature and uses of the instrument,[2] and second, "that whenever one of two innocent parties must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it."[3] "The object of the law merchant," said Byles, J., in *Swan* v. *North British Australasian Co.*,[4] "as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore honest acquisition confers title."

Implied contract.

Representation involved.

The situation between the parties to commercial instruments is, no doubt, to be regarded as one of contract, the parties having agreed that the instrument is to be taken as founded upon certain facts. When therefore the position of one by acting on that agreement is altered, the other ought not to be admitted to deny it. The resemblance to estoppel by representation is, however, an artificial one, since there is no representation beyond that involved in the contract itself.[5]

Contract may be express.

In *Ashpitel* v. *Bryan*[6] the defendant, a relation of one John Peto, who died indebted to him, agreed with James Peto that a bill

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[1] See Pollock on Contract, 5th ed., 217—219, where it is pointed out that, the mere assignment of a contract being insufficient to meet the requirements of commerce, the benefit of the contract is obtained by declaring an instrument to contain the contract, by facilitating its transfer, and by dispensing with the proof of the position which the parties occupy relatively to each other. See, for definitions of negotiable instruments and their attributes, Act XXVI of 1881, Chapter 2; 45 & 46 Vict, c. 61, ss. 2—21; *Couch* v. *Crédit Foncier*, L. R., 8 Q. B., 374 (381) [1873], citing with approval the following remarks of the learned Editor of Smith's Leading Cases [see *Miller* v. *Race*, 9th ed., Vol. i, 505]. "It may therefore be laid down as a safe rule that, where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a negotiable instrument, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt." As to the recognition of foreign instruments see *Goodwin* v. *Robarts* in the Court of Exchequer Chamber, L. R., 10 Ex., 337 [1875], and the cases there cited.

[2] *Per* Byles, J., in *Swan* v. *North British Australasian Co.*, 2 H. & C., 175 (185) [1863].

[3] *Per* Ashurst, J., in *Lickbarrow* v. *Mason*, 2 T. R., 63 (70) [1787]. See *Price* v. *Neal*, 3 Burr., 1355 (1357) [1762].

[4] 2 H. & C., 175 (184) [1863]. See *per* Cockburn, C. J., at p. 189.

[5] See Bigelow on Estoppel, 5th ed., 481.

[6] 3 B. & S., 474 [1863].

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should be drawn and indorsed in the name of John, and the defendant accepted the bill in consideration of James forbearing to make any claim in opposition to the defendant's taking possession of the stock in trade of the deceased. The plaintiff as executor of John brought an action upon the bill. It was held that the defendant was precluded by his own act from saying that the person whose name appeared on the bill was fictitious or was dead at the time. The estoppel in that case was founded on the express agreement of the parties.

Position of the parties defined by law.

But the character impressed upon the parties to negotiable instruments is derived from the law merchant which, upon grounds of commercial utility, recognised the makers, drawers and indorsers of such instruments as occupying certain defined positions relatively to one another. The contract to which they have become parties may embrace new parties as the instrument circulates, and the position of each person has come to be regarded as having certain definite legal rights and duties attached to it. The rules, for instance, which prevent the acceptor of a bill of exchange from disputing certain admitted facts, may be called "estoppels," but they are estoppels springing from the nature of the transaction, founded upon mercantile custom, and may now be regarded as statutory estoppels.[1]

Statutory estoppels.

The position of the parties to negotiable instruments[2] in this country is defined in certain enactments, and may be presented as follows :—

As to acceptor :[3]—

Acceptor.

Section 117 of the Evidence Act[4] provides that "no acceptor of a bill of exchange shall be permitted to deny that the drawer

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[1] See Chalmers on Bills of Exchange, 4th ed., 312, 313.

[2] See Act XXVI of 1881, ss. 4—9, for definitions of 'promissory note,' 'bill of exchange,' 'cheque,' 'drawer,' 'drawee,' 'drawee in case of need,' 'acceptor' 'acceptor for honour,' 'payee,' 'holder,' 'holder in due course.' A negotiable instrument is defined [s.13] as "a promissory note, bill of exchange or cheque expressed to be payable to a specified person or his order, or to the order specified of a person, or to the bearer thereof, or to a specified person or the bearer thereof." "When a promissory note, bill of exchange or cheque is transferred to any person so as to constitute that person the holder thereof, the instrument is said to be negotiated" [s. 14]. See as to indorsement ss. 15, 16.

[3] "Acceptor" is defined by s. 7 of the Negotiable Instruments Act (XXVI of 1881). "After the drawee of a bill has signed his assent upon the bill or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the acceptor." As to the contract of the acceptor, see Byles on Bills, 15th ed., 266—268.

[4] Act I of 1872.

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had authority to draw such bill or to indorse it;" but,[1] "The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn;" that is he may show that the signature of the drawer is a forgery.[2]

This section is supplemented by sections 41 and 42 of the Negotiable Instruments Act,[3] which are as follows:—

[s. 41] "An acceptor of a bill of exchange already indorsed is not relieved from liability by reason that such indorsement is forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill.

[s. 42] "An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer."[4]

Position of other parties to negotiable instruments.

Other sections define the position of the parties to a negotiable instrument.[5]

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[1] Expl. I to s. 117.

[2] The rule in England is otherwise, *Sanderson* v. *Collman*, 4 M. & Gr., 209 [1842]. "It is of immense importance," said Coltman, J., "that it should be understood and settled that a party who accepts a bill is thereby precluded from disputing the drawing of that bill. Bills are received by bankers and bill brokers upon the faith of the acceptance of the drawees, who must be presumed to have sufficient means of satisfying themselves as to the authenticity of the instruments." See 45 and 46 Vict., c. 61, s. 54, which provides that the acceptor of a bill "(1) engages that he will pay it according to the tenor of his acceptance: (2) is precluded from denying to a holder in due course: (*a*) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (*b*) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (*c*) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement." See Byles on Bills, 15th ed., 266—268.

[3] Act XXVI of 1881.

[4] "The defendants," said Bayley, J., in *Cooper* v. *Meyer* [10 B. & C., 471 (1830)], "ought not to have accepted the bills without knowing whether or not there were such persons as the supposed drawers. If they chose to accept without making the enquiry, I think they must be considered as undertaking to pay to the signature of the person who actually drew the bills."

[5] The liability of drawer and indorser is thus stated in s. 55 of the English Act:—"(1) The drawer of a bill by drawing it—(*a*) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken; (*b*) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. (2) The indorser of a bill by indorsing it—(*a*) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it; provided that the requisite proceedings on dishonour be duly taken; (*b*) is precluded

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By section 32, in the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and an acceptor at or after maturity is bound to pay the amount thereof to the holder on demand. In default of such payment, the maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default.

By section 37, the maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, liable therein as principal debtors, and the other parties are liable as sureties.

By section 88, an acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement, notwithstanding any previous alteration of the instrument.

By section 120, no acceptor of a bill of exchange for the honour of the drawer[1] shall, in suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally drawn.

The same rule applies to the maker of a promissory note, and the drawer of a bill of exchange, or cheque.

By section 121, no acceptor of a bill of exchange payable to, or to the order of, a specified person shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill to indorse the same.

The maker of a promissory note is in the same way estopped from denying the capacity of the payee to indorse.

By section 122, no indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the

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from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements; (*c*) is precluded from denying to his immediate or subsequent indorser that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto." See Byles on Bills, 15th ed., 174, 175.

[1] "When acceptance is refused, and the bill is protested for non-acceptance, and any person accepts it *supra protest* for honour of the drawer or of any one of the indorsers, such person is called 'an acceptor for honour'"—s. 7. See further, as to acceptance for honour, ss. 108—112; *Phillip* v. *Im Thurn*, L. R., 1 C. P., 463 [1866]; 18 C. B. (N. S.), 694 (on demurrer). The bill is treated as a bill payable to bearer. See Byles on Bills, 15th ed., 269—274.

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signature or capacity to contract of any prior party to the instrument.

Inchoate instruments.

Another class of cases has now to be examined. The giver of a blank acceptance, or an indorsement on a blank note filled up for a larger sum than he authorised, has been described as issuing a letter of credit for an indefinite amount.[1]

Rule for protection of innocent transferees for value.

In *Foster* v. *Mackinnon*[2] Byles, J., after observing that a written contract may be invalidated on the ground of fraud or mistake added :—"These cases apply to deeds, but the principle is equally applicable to other written contracts. Nevertheless this principle when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill stamp, and part with it, and the paper is afterwards filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum the stamp will cover. In these cases, however, the party signing knows what he is doing ; the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined."

Application of the rule to instrument pledging immoveable property.

The above rule has been embodied in the Negotiable Instruments Act,[3] and has been extended in this country so as to include

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[1] *Russell* v. *Langstaffe*, 2 Douglas, 496 [1780]. In *Wahidunnessa* v. *Surgadass*, I. L. R., 5 Calc., 39 [1879], Garth, C. J., said: "We have already observed in the course of the argument, that in the case of a bill of exchange, or promissory note, an indorsement made before the instrument is drawn, renders the indorser liable for any amount warranted by the stamp, which may afterwards be filled up upon the face of the bill. In *Russell* v. *Langstaffe*, where several promissory notes had been indorsed by the defendant on blank forms without any amount being mentioned, Lord Mansfield says : 'Nothing is so clear as that an endorsement on a blank note is a letter of credit for an indefinite sum. It does not lie in the defendant's mouth to say that these endorsements were not regular.'" See Byles on Bills, 15th ed. 92, 97, 188, 189, 254.

[2] L. R., 4 C. P., 704 (712) [1869].

[3] S. 20 of Act XXVI of 1881 is as follows:—"Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the

the case of a blank stamp paper filled up so as to constitute a pledge of immoveable property. In the case of *Wahidunnessa* v. *Surgadass*[1] the defendant's ancestor, Mir Haider Ali, delivered to his karpurdaz a blank paper stamped as a bond, duly signed and sealed, for the purpose of raising Rs. 16,000. The latter, by the instructions of Mir Haider's uncle, who was in the habit of transacting his business, had a mortgage bond drawn up, upon the faith and security of which the sum was paid to the karpurdaz. The defendant contended that, as Mir Haider's representative, he was not bound by a document, the contents of which were not known to Mir Haider, and challenged the *bona fides* of the transaction. But the Court held that the principle of *Russell* v. *Langstaffe*, would apply in the case of an instrument pledging immoveable property by way of mortgage for the purpose of securing money borrowed. The above case may be said to rest upon estoppel by conduct of culpable negligence proximately connected with the result occasioned thereby. Or the case may be explained as one of agency upon the ground of estoppel by apparent authority. The blank stamp paper could not be regarded as a negotiable instrument, but was intended for the purpose of raising a loan.

Wahidunnessa *v.* Surgadass [1879], a case of estoppel by negligence or by apparent authority.

In the case of inchoate instruments the relation between the original parties is that of principal and agent. There is no express representation on the part of the principal, and, as pointed out by Mr. Bigelow,[2] the principal's conduct in trusting the agent is not the immediate cause of the other party trusting the agent. Between the two acts may intervene a course of fraudulent conduct on the agent's part. The estoppel here, if it can be so called, is implied from the negotiability of the instrument. The section assumes that the instrument is delivered incomplete to another, presumably for the purpose of putting it into circulation. If the agent exceeds his instructions, or effects a fraud, the question becomes one of some difficulty. It appears more correct to rest

The case of inchoate instruments appears to rest upon the ground of negotiability.

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case may be, upon it, a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder." See s. 20 of the English Act. As to 'holder in due course,' see Act XXVI of 1881, s. 9.

[1] I. L. R., 5 Calc., 39 [1879].

[2] Bigelow on Estoppel, 5th ed., 457, 494, 565.

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upon the ground of negotiability the liability of one who puts his name to blank paper.[1]

There must be a delivery.

The question in these cases will be whether the signer delivers the incomplete instrument to the agent for negotiation. Where it is obtained from him fraudulently, or without his knowledge, or for an unlawful consideration, it would seem that no title can generally be founded upon the instrument.[2]

Negligence. Agency.

Certain cases which involve questions of negligence and agency have now to be considered.

Cases of negligence.

In the case of *Young* v. *Grote*,[3] a customer of a bank entrusted to his wife signed blank cheques. She caused one to be filled up in such a way that a blank space was left before the letters and figures denoting the amount, so that her husband's clerk was thereby enabled to insert words and figures representing a larger amount, payment of which was made by the bank. The Court of Common Pleas held that the bankers having been misled by the fault of the drawer of the cheque, the latter must bear the loss, he by want of proper caution having so drawn the cheque that an interpolation could be made. The case proceeded upon the authority of an extract from Pothier[4] which makes the inability of the drawer to recover depend upon his fault in the mode of draw-

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[1] In *Ex parte Swan* [7 C. B. (N. S.), 446 (1859)], Williams, J., observes: "In *Marston* v. *Allen* [8 M. & W., 494, 504 (1841)], Alderson, B., in delivering the judgment of the Court of Exchequer, refused to adopt the proposition that the previous party to a bill is *estopped* from setting up the defence of fraud against the case of a *bona-fide* holder for value, and thought it better to say that, by the law merchant, every person having possession of a bill, has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer it to a *bona-fide* holder for value. It seems therefore doubtful whether the cases as to the liability of a man who signs a blank bill or note or cheque are founded on the doctrine of estoppel, or on *a rule of law merchant* that an actual authority is thereby conferred on the person in whose hands the instrument is. It is, however, plain that none of the decisions as to the effect of signing instruments in blank extend beyond the case of negotiable instruments, and it seems to me that it would be inconvenient and dangerous to apply the principle of them any further." These remarks are concurred in by Channel, B., in *Swan* v. *North British Australasian Co.*, 7 H. N., 660.

[2] See Act XXVI of 1881, s. 58, as to negotiable *instruments* lost or stolen.

[3] 4 Bing., 253 [1827]. In *Baxendale* v. *Bennett* [L. R., 3 Q. B. D., at p. 532], Brett, L. J., says it is difficult to support this case, and that the observations made by the House of Lords in *Bank of Ireland* v. *Evans' Charities* [5 H. L. Ca., 389 (1855)] have shaken *Young* v. *Grote*, and *Coles* v. *Bank of England* [10 A. & E., 437 (1839)] as authorities. See, however, *Halifax Union* v. *Wheelwright*, L. R., 10 Ex., 183 [1875]; *Robarts* v. *Tucker*, 16 Q. B., 560 [1851].

[4] Traité du Contrat du Change, p. 1, c. 4, s. 99.

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ing the cheque,[1] and is consistent with the rule that negligence in order to produce an estoppel must be in the transaction itself.[2]

Cheque carelessly drawn.

Ingham v. *Primrose*,[3] which has since been doubted, was decided upon the authority of the case last cited. The defendant accepted a bill of exchange and gave it to M, who put his name to it as drawer, for the purpose of getting it discounted. M, being unable to effect this, returned the bill to the defendant, who, with the intention of cancellation, tore the bill in half and threw it into the street. M picked up the bill, saying to the plaintiff that it was better not to throw it down in the street, and afterwards put it into circulation. The bill being indorsed to the plaintiff, in an action by him upon the bill, the Court of Common Pleas was of opinion that the appearance of the bill when it reached the plaintiff's hands was as consistent with the hypothesis that it had been torn in two, for the purpose of safer transmission by post as with the hypothesis of its having been torn for cancellation, and that, upon the principle of *Young* v. *Grote*, the defendant, by abstaining from effectual cancellation, had led the plaintiff to become a *bonâ fide* holder for value.

Bill ineffectually cancelled.

In the case of *Arnold* v. *The Cheque Bank*,[4] the plaintiffs, who were merchants at New York, purchased of Stewart and Co., a New York firm, a draft drawn by the latter firm on a London Bank payable on demand to the order of the plaintiffs, who, desiring to make a payment to Williams and Co., their Bradford correspondents, specially indorsed the draft to them and inclosed it in a letter addressed to them. The letter was stolen by a clerk of the plaintiffs who forged Williams and Co.'s indorsement, and by the agency of a confederate caused the defendant bank to present the draft and obtain payment, the money being at once drawn out by the confederate. The plaintiffs having sued the defendant bank for money had and received, the question arose whether evidence was admissible to shew that the plaintiffs had acted negligently in not sending a letter of advice to Williams and Co. in addition to the letter containing the draft. Upon a rule for a new trial it was

Where fraud intervenes there must be proximate negligence on the part of the principal.

Arnold *v* The Cheque Bank [1876].

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[1] See *Arnold* v. *Cheque Bank*, L. R., 1 C.P.D., 587, *per* Coleridge, , C.J.; *Bank of Ireland* v. *Evans' Charities*, 5 H.L. Ca., 389, *per* Parke, B., at p. 410.

[2] See *per* Blackburn, J., in *Swan* v. *North British Australasian Co.*, 2 H. & C., 181 [1864].

[3] 7 C. B. (N. S.), 82 [1859].

[4] L. R., 1 C. P. D. 578 (1876).

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held that the property in the bill remained in the plaintiffs, that the defendants had received the money to their use, that there was no evidence of negligence which could operate by way of estoppel—the posting of the letter being very remotely connected with the receipt of the draft by the defendants—and that the evidence tendered was inadmissible, the supposed duty to send a separate letter of advice being collateral to the indorsing and forwarding of the draft, and the failure of that duty being in no sense the proximate cause of the larceny and forgery which had taken place.[1]

Lost or stolen instrument.

In *Baxendale* v. *Bennett*[2] a blank acceptance had been given by the defendant to one Holmes, who, having no occasion to use it, returned it to the defendant who placed it in an unlocked drawer, to which various persons had access, and from which the bill was stolen. The plaintiff became the *bonâ fide* holder for value without notice of fraud. Lopes, J., held, upon the authority of *Young* v. *Grote* and *Ingham* v. *Primrose*, that the defendant had facilitated the theft by his own negligence. The learned Judges of the Appeal Court held that the defendant was not liable, but upon different grounds. Bramwell, L. J., was of opinion that there could be no

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[1] Lord Coleridge, C. J., in delivering the judgment of the Court refers to the previous cases. "Reliance was placed by the defendants in the case of *Young* v. *Grote* [4 Bing., 253]. That case no doubt must be considered as well decided; but various opinions have been expressed as to the real ground of the decision. In the judgment of Parke, B., in *Robarts* v. *Tucker* [16 Q. B., 560], it was put on the ground that a customer had, by signing a cheque, given authority to any one in whose hands it was, to fill it up in blank in whatever way the blank permitted. But we have only to look at the case itself to see that it really proceeded on the authority of the extract from Pothier cited in the judgment of Best, C. J. ... The rule which is expressed by Ashurst, J., in *Lickbarrow* v. *Mason* [2 T. R., 70 (1787)], was, though not expressly referred to, observed and acted on in *Young* v. *Grote*; and it has received illustration and explanation in subsequent cases on the subject which show that the words 'enabling a person to occasion the loss' must be understood to mean by some act, conduct, or default in the very transaction in question. See *Freeman* v. *Cooke*." [Then after referring to the rule as to negligence laid down by Blackburn, J., in *Swan* v. *North British Australasian Co.* (2 H. & C., 181) the Chief Justice continued]: "*Young* v. *Grote* when correctly understood is in entire accordance with the rule thus expressed. So in *Ingham* v. *Primrose* [7 C. B. (N. S.), 82], also cited to us, in which the negligence was in the destruction of a draft afterwards put together and fraudulently presented; while in the case of *Bank of Ireland* v. *Evans' Charities* [5 H. L. Ca., 389], it was expressly held both that the negligence in order to operate as estoppel must be negligence 'in or immediately connected with the transfer itself,' and further that it must also be the proximate cause of the loss.' We may also refer to the judgment of Williams, J., in *Ex parte Swan* [7 C. B. (N. S.), 400] as showing the distinction between *Young* v. *Grote* and those cases in which the neglect, if any, was collateral to the transaction."

[2] L. R., 3 Q. B. D., 525 [1878].

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estoppel, the acceptor not having voluntarily parted with the bill, which had been got from him by the commission of a crime, distinguishing the above cases upon that ground, and held, further, that his negligence was not the proximate or effective cause of the fraud. Brett, L. J., in addition to these grounds, considered that the defendant had never issued the bill intending it to be used, or authorised any one to fill in the drawer's name.[1]

In *Scholfield* v. *Earl of Londesborough*,[2] where all the cases are reviewed, it was held that the mere fact that the document bears a higher stamp than it need have done does not estop the acceptor from setting up the subsequent forgery, where there is no negligence on the part of the acceptor. It is pointed out by Charles, J., that a person who signs a negotiable instrument with the intention that it shall be delivered to a series of holders does incur a liability to those who take the note, bill, or cheque, not to be guilty of negligence with reference to the form of the instrument. *If he signs it in blank he is responsible for any amount the stamps will cover. If he signs it negligently in such a shape as to render alteration a likely result he is responsible on the altered instrument.* In the case now cited the defendant accepted a bill for £500 on paper bearing a stamp sufficient to cover £4,000. The instrument was, however, complete in form, and the learned Judge held that it was not enough that the defendant accepted the bill in a form facilitating forgery and that no negligence was proved.

In this connection must be noticed the provisions of section 58 of the Negotiable Instruments Act,[3] which apparently does not

Act XXVI of 1881, s. 58.

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[1] Brett, L. J., expresses the liability of a person who accepts a bill in blank in these terms: "He gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorise him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorised the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person."

[2] L. R., '94, 2 Q. B., 660.

[3] "When a negotiable instrument has been lost or has been obtained from any maker, acceptor, or holder thereof by means of an offence or fraud, or for unlawful consideration, no possessor or indorsee who claims

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relate to inchoate instruments. The estoppel there contemplated must, however, be limited to the case of a holder in due course, or one occupying that position. The section in terms only applies to *instruments* lost, or obtained by means of a fraud. Where, therefore, the holder of a negotiable security entrusts it to his broker or agent for the purpose of dealing with it in a certain way, and the agent puts the security into circulation, the holder will be precluded, as against one who takes it from the agent in good faith as a negotiable security, from denying it to be such.

Cases of agency.

Goodwin v. Robarts [1876].

The general rule is within the principle of the decision in *Goodwin* v. *Robarts*[1] in the House of Lords, and may be stated shortly in the words of the judgment in *Rumball* v. *The Metropolitan Bank*. "If a party possessed of a security purporting on the face of it to be transferable by delivery, chooses to leave such security in the hands of a third party, and the latter makes it over to a *bonâ fide* holder for value, the true owner must be taken to have brought about his own loss, and cannot recover it back."[2]

General Rule.

Thus in *Rumball* v. *The Metropolitan Bank*[3] the plaintiff deposited certain scrip certificates with his stock-broker to pay the remaining instalments as they fell due, and to hold them as the plaintiff should direct. The stock-broker fraudulently deposited the certificates with the defendants as security for money due from him to them. The defendants were not aware of any fraud, and the certificates themselves stated that on the payment of the instal-

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through the person who found or so obtained the instrument, is entitled to receive the amount due thereon from such maker, acceptor, or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course."

[1] Where Lord Cairns observes: "The scrip itself would be a representation to any one taking it —a representation which the appellant must be taken to have made, or to have been a party to—that if the scrip were taken in good faith, and for value, the person taking it would stand to all intents and purposes in the place of the previous holder. Let it be assumed, for the moment, that the instrument was not negotiable, that no right of action was transferred by the delivery, and that no legal claims could be made by the taker in his own name against the foreign Government, still the appellant is in the position of a person who has made a representation, on the face of his scrip, that it would pass with a good title to any one, on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made. My Lords, I am of opinion that on doctrines well established, of which *Pickard* v. *Sears* [6 Ad. & E., 474] may be taken to be an example, the appellant cannot be allowed to defeat the title which the respondents have thus acquired." L. R., 1 Ap. Ca., 490 [1876]. See also *per* Lord Hatherley, 493: *per* Lord Selborne, 497, to the same effect.

[2] L. R., 2 Q. B. D., 194 (197) [1877].

[3] L. R., 2 Q. B. D., 194 [1877].

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ments the bearer would be entitled to be registered as the holder of certain shares in the Anglo-Egyptian Banking Company. The Court held that the case came within the principle of estoppel stated in the judgment of Lord Cairns in *Goodwin* v. *Robarts*,[1] and also within the principle of the decision in that case as decided in the Exchequer Chamber[2] with regard to the usage of the monetary world in respect of such certificates.

Not regularly put into circulation.

But where share certificates were issued to the registered shareholders with a blank form of transfer at the back accompanied by a blank form of power-of-attorney to enable a transferor to execute a surrender and cancellation of the certificate in favour of the transferee who, on desiring to have his name registered, would insert his name in the blank transfer and deposit the certificate with the Company for registration, and the agents of the transferee without his knowledge filled in his name and address in the forms and obtained money from a Bank upon the security of the share certificates, which were allowed to remain in their possession as brokers ; it was held that only an inchoate title had passed to the Bank, and that the defendant was not effected by any estoppel. "The certificates," said Chitty, J., "contemplate transfer by getting in the name of the transferee and by registration in the books of the Company. . . . There is on the face of them an engagement that the shares thereby represented are transferable only on the surrender and cancellation of the certificate. . . . Estoppels cannot be manufactured arbitrarily ; and no estoppel can be raised on a document inconsistent with the terms of the document itself."[3]

No estoppel can be raised inconsistent with the terms of the document.

Genuine acceptance of forged bill, payment of which is afterwards obtained by fraud of servant.

The question of estoppel was much considered in the case of *Bank of England* v. *Vagliano Brothers*[4] in all the Courts, though the decision in part is as to the effect of a section in the Bills of Exchange Act of 1882.[5] The plaintiff, who traded under the name of Vagliano Brothers, sued the Bank for a declaration that the Bank

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[1] L. R., 1 Ap. Cas., 476 (490) [1876].

[2] L. R., 10 Ex., 337 [1875].

[3] *Colonial Bank* v. *Hepworth*, L. R., 36 Ch. D., 36 (53) [1887].

[4] L. R., Ap. Cas., '91, 107 [in the House of Lords], reported in L. R., 23 Q. B. D., 243, in the Court of Appeal, and in L. R., 22 Q. B. D., 103, before Charles, J., *sub nom Vagliano Brothers* v. *The Bank of England*.

[5] 45 & 46 Vict., c. 61, s. 7, s. 3: "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

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were not entitled to debit him with the amount of certain forged bills of exchange accepted in good faith by him. It appeared that one Vucina, a foreign correspondent of the plaintiff, was in the habit of drawing upon him, and sometimes made the bills payable to the order of C. Petridi and Co. of Constantinople. One Glyka, the correspondence clerk of the plaintiff, forged the signature of Vucina to bills, purporting to be drawn by Vucina on the plaintiff to the order of C. Petridi and Co. Glyka then placed among the plaintiff's correspondence counterfeit letters of advice relating to the forged bills, and by this means procured the genuine acceptances of the plaintiff. Glyka then forged upon the bills endorsements purporting to be those of C. Petridi and Co., the payees, who were an existing firm in close business relations with the plaintiff, and was paid across the Bank's counter the amounts for which the bills were drawn.

It was held by the Court of Appeal, affirming the decision of Charles, J., that the plaintiff had not been guilty of negligence immediately connected with the transaction, so as to disentitle him to recover the amount of the forged bills with which the Bank proposed to debit him, and that the section of the Act afforded no protection to the defendant Bank, as C. Petridi and Co., being an existing firm, could not be said to be "fictitious or non-existing persons."

The House of Lords were divided in opinion, but the majority reversed the decision of the Court of Appeal, five members of the House[1] being of opinion that C. Petridi and Co. were fictitious payees within the meaning of the section. Four members of the Court[2] based their opinion in whole or in part upon the *conduct* of the parties, and the two dissentient members[3] were in favour of the plaintiff on both the above grounds.

Estoppel limited to case of bonâ fide holders.

If one without enquiry takes from another an instrument signed in blank by a third person, and fills up the blanks, he cannot even in the case of a negotiable instrument, claim to be a purchaser for value without notice, so as to place himself in any better position than the person through whom he claims. In *France* v.

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[1] Lord Halsbury, L. C., and the Lords Watson, Herschell, Macnaghten and Morris.

[2] Lord Halsbury, L. C., the Earl of Selborne and the Lords Watson and Macnaghten.

[3] Lord Bramwell & Lord Field.

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Clark,[1] the plaintiff deposited share certificates with a person named Clark as security for £150, handing him a signed transfer with the name of the transferee, the consideration, and the date left in blank. Clark deposited the certificates and the blank transfer with the defendant Q as security for £250, who subsequently filled in his own name as transferee and sent the transfer to the Company for registration. The plaintiff sued Clark's administratrix and Q (offering to pay the latter the amount due by himself to Clark) for an account, and to have the shares re-transferred. The Court of Appeal held affirming the decision of Fry, J.,[2] that Q had no claim against the plaintiff except for what was due by the plaintiff to Clark. The Earl of Selborne, L. C., after referring to *Hogarth* v. *Latham*,[3] *Hatch* v. *Searles*,[4] and *Tayler* v. *Great Indian Peninsular Co.*[5] observed: "He cannot, by his own subsequent act, alter the legal character, or enlarge in his own favour the legal or equitable operation of the instrument;" and further held that the absence of any proof that such transfers were by mercantile usage negotiable rendered it unnecessary to consider whether such usage, if proved, would have brought the case within the authority of *Goodwin* v. *Robarts*.[6]

But, where a person takes documents of value, whether negotiable or not, from a broker or agent whom he knows to possess only a restricted authority, he must enquire as to the limits of that authority.

A person taking documents from an agent known to have limited authority is put upon enquiry.

In *Sheffield* v. *The London Joint Stock Bank*,[7] the plaintiff, Lord Sheffield, gave one Easton authority to borrow £26,000 upon the security of certain stock and bonds. These bonds, with the stock certificates and the transfers of the stocks executed by Lord Sheffield, were deposited by Easton with one Mozley, who lent Easton the sum required. Mozley, as security for large loan accounts

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[1] L. R., 26 Ch. D., 257 [1884].

[2] L. R., 22 Ch. D., 830.

[3] L. R., 3 Q. B. D., 643 [1878], *per* Bramwell, B., at p. 647.

[4] 2 Sm. & Giff., 147 [1854], *per* Stuart, V. C., at p. 152.

[5] 4 DeG. & J., 559 [1859], *per* Turner, L. J., at p. 574.

[6] L. R., 10 Ex., 76, 337; L. R., 1 Ap. Cas., 476 [1876].

[7] L. R., 34 Ch. D., 95 (C. A.); S. C., L. R., 13 Ap. Cas., 333 [1888]. See also *Simmons* v. *London Joint Stock Bank*, L. R., '91, 1 Ch., 270 [1890], a similar case, and the definition of 'negotiable securities,' at p. 294; reversed in the House of Lord, '92, A. C., 201, where it is stated that the decision in *Sheffield* v. *The London Joint Stock Bank* turned entirely upon the special facts of that case. See also *Bentinck* v. *London Joint Stock Bank*, L. R., '93, 2 Ch., 120.

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which he had with the defendant Banks deposited with them some of the stocks, transfers, and bonds, together with other stocks belonging to his customers, the transfers of the stock being filled up with the names of officials or nominees of the Banks. Mozley eventually became bankrupt, and the Banks sold some of the securities to repay themselves for the debt due to them by Mozley. The action was brought by Lord Sheffield and Easton, claiming that they were entitled to redeem the securities on paying what was due to Mozley's trustee in liquidation, for redemption of the unsold securities, and damages. The Court of Appeal held that the Banks were in the position of purchasers for value without notice, having the legal title to the securities, and believing that Mozley had authority to deal with them as his own. The House of Lords reversed the decision of the Court of Appeal, being of opinion that the Banks either actually knew or had reason to believe that the securities did or might belong, not to Mozley but to his customers, that they were bound to enquire into the extent of Mozley's authority, and that the plaintiffs were entitled to succeed whether the securities were negotiable or not.

The principle would seem to be that in order to raise an estoppel against Lord Sheffield, it was necessary to show that he so acted as to lead the Banks to believe that they were acquiring a good title, Mozley being known to possess only a limited authority.

This principle was applied in *The Colonial Bank* v. *Cady*,[1] where the English executors of an English holder of shares in an American Railway gave them to their brokers in London and signed blank transfers with a power-of-attorney indorsed on the share certificate in order to enable the brokers to register the shares and draw the dividends. The brokers fraudulently deposited the shares with the defendant Bank as security for advances to themselves, and became bankrupt. By New York law the registered owner of shares delivering signed transfers would be estopped from establishing his title, but the transfers would require to be authenticated, and this was also the practice of the London Stock Exchange. The House of Lords held, affirming the decision of the Court of Appeal, that the conduct of the executors in delivering

[1] L. R., 15 Ap. Cas., 267 [1890]; L. R., stated by Lord Herschell: L. R., 15 Ap. 38 Ch. D., 388 C. A). See the rule as Cas., pp. 283, 286.

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the transfers was consistent with the intention either to sell or to pledge the shares, or to have themselves registered as the owners, and that the Bank ought to have enquired into the broker's authority; the plaintiffs, therefore, were not making a claim inconsistent with anything they had said or done.

In conclusion a few other cases require to be mentioned—

Adoption of forged signature.

Where one has admitted a forged signature to a bill of exchange or note to be his own, and has thereby altered the condition of the holder to whom the declaration or admission has been made, he is estopped from denying his signature upon an issue joined in an action upon the instrument.[1] And a person who knows that another is relying upon his forged signature to a bill will not be permitted to lie by and not divulge the fact until the position of the other has been altered for the worse.[2] The question whether a forged bill has or has not been adopted by the person whose signature is forged is one of fact, but the adoption of a bill may be a matter of legal inference from ascertained facts.[3]

There must be change of position and silence is not always sufficient.

In *Mackenzie* v. *British Linen Co.*,[4] one Fraser forged the names of A and B as drawer and indorser to the Company, who discounted the bill for Fraser who signed it as acceptor. The bill was dishonoured, notice being sent to A and B on a Saturday. They did not communicate with the Bank, and on the following Monday, Fraser brought to the Bank a blank bill with A's and B's names forged as drawer and indorser. The defendants agreed to accept the bill in renewal of the previous one. The second bill was dishonoured, and notice was given to A and B three days before due date, and again upon dishonour. The Bank were informed of the forgeries a fortnight after the first notice, and A and B declined to pay the amount of the bill. A stated that Fraser had admitted to him that he had forged his name on the first bill, but assured him that the bill had been taken up by cash, so he did not think it necessary to inform the Bank. He denied any knowledge of the second bill until he received the Bank's notices. The Company charged A to make payment of the second bill on the ground that it was drawn and indorsed and presented to the Bank with his

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[1] *Brook* v. *Hook*, L. R., 6 Exch., 89 (99) [1871]; *Ashpitel* v. *Bryan*, 3 B. & S., 474 (492) [1863].

[2] *Mackenzie* v. *British Linen Co.*, L. R., 6 Ap. Cas., 109 [1881].

[3] *Ib.*

[4] L. R., 6 Ap. Cas., 82 [1881].

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knowledge and authority, and that he had by his conduct misled the Bank into believing that his signature was genuine, and had assumed the responsibility attached to the drawing and indorsement. The House of Lords, reversing the decision of the Court of Session, held that the circumstances of the case raised no estoppel against A, that A's mere silence for a fortnight from the time when he first knew of the forgery (during which time the position of the Bank was in no way altered for the worse) could not be held as an admission or adoption of liability, and that the case fell outside the definition of Parke, B., in *Freeman* v. *Cooke*.[1]

No presumption of authority as to other signatures.

The payment by a party of one bill which purports to bear his acceptance does not (in the absence of a course of business, or of any evidence of authority or of a ratification or representation on his part), afford any presumption that all subsequent bills bearing the same sort of acceptance were authorised by him.

In *Morris* v. *Bethell*[2] the defendant was sued upon a bill of exchange which bore his signature as acceptor. He pleaded that the acceptance was not his signature, nor was it written with his authority or adopted by him, and the jury so found. The plaintiff, however, relied upon the fact that the defendant had paid another bill (of which the plaintiff was the holder) upon which the defendant's name was written as acceptor without his authority. "There was no evidence," said Bovill, C. J., "that the defendant ever knew that the plaintiff was the holder of the former bill. If it were made to appear that there has been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of his principal, there would be evidence and almost conclusive evidence against the latter that the acceptance was written by his authority. That was the case of *Barber* v. *Gingell*.[3] . . . If the defendant had by his conduct led the plaintiff to suppose that the acceptance was his genuine signature or was authorised by him, he might be estopped from disputing it; otherwise not."

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[1] 2 Exch., 654; L. R., 6 Ap. Cas., 87, *n*. See *Barber* v. *Gingell*, 3 Esp., 60 [1800], where the defendant was held to have adopted the acceptance by payment of other forged bills of the same party. See, however, *Morris* v. *Bethell*, L. R., 5 C. P., 47 [1869].

[2] L. R., 5 C. P., 47 (50) [1869].

[3] 3 Esp., 60 [1800].

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A man may not take advantage of his own wrong.

In *Bishen Chand* v. *Rajendro Kishore Singh*,[1] the *bonâ fide* holder for value of a forged hundi to whom, after dishonour, it had been transferred by indorsement by the payees who knew at the time of indorsement that the hundi was forged, sued the payees on the hundi to recover the amount he had paid them for it. The payees were held estopped from setting up the forgery so as to defeat the suit.

Post Office orders.

In *The Fine Art Society* v. *The Union Bank of London*[2] the plaintiffs intrusted to their Secretary, for the purpose of payment into their account with the defendant's Bank, certain Post Office orders. The Secretary paid them into an account which he kept without his employer's knowledge in the same Bank, and the Bank collected the proceeds of the orders and handed them to him. It was contended for the defendants that the orders in the hands of a banker became *quasi* negotiable instruments by virtue of a Post Office Regulation, which provided that the orders, when stamped with the name of a banker, became payable without the signature of the payee, so that the defendants obtained an independent title to them upon the authority of *Goodwin* v. *Robarts*;[3] but the Court of Appeal held that the regulation merely operated to substitute the signature of the banker for that of the payee, and did not confer upon the instruments in the hands of bankers the character of instruments transferable by delivery to bearer, and that the plaintiffs had not been guilty of any negligence.

Mercantile meaning of document.

It may here be observed that where, in any particular trade, warrants are issued warranting wharfingers and others to deliver particular goods, such warrants may become negotiable and be dealt with as securities. So in *Merchant Banking Co.* v. *Phœnix Bessemer Co.*[4] the holders for value of certain iron warrants were held, by the usage of the iron trade, to be entitled to the goods free from any vendor's lien. "If," said the Master of the Rolls, "you give a person a document intending he shall use it in that particular way by obtaining money upon it, you cannot afterwards be allowed to say, as against persons from whom he has obtained money, that the person is not to have the benefit thereof."[4] In

Railway receipt.

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[1] I. L. R., 5 All. 302 [1883].
[2] L. R., 17 Q. B. D., 705 [1886].
[3] L. R., 10 Ex., 76, 337; L. R., 1 Ap. Cas., 476.
[4] L. R., 5 Ch. D., 205 (217) [1877].

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Bombay it has recently been held that a railway receipt is not a document of title within the meaning of section 103 of the Contract Act.[1]

The judgments in *Chamberlain* v. *Young*[2] would seem to shew that where an instrument is issued and taken as a negotiable instrument, the Courts will not allow the parties thereto to escape from their liabilities merely on account of small irregularities in the form of the instrument.[3]

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[1] *The Great Indian Peninsular Railway Co.* v. *Hanmandas*, I. L. R., 14 Bom., 57 [1889]. As to Railway Bonds payable to bearer, see *Venables* v. *Baring Brothers & Co.*, L. R., '92, 3 Ch., 527.

[2] L. R., '93, 2 Q. B., 206.

[3] See the chapter on Negotiable Securities for Money in Chalmers on Bills, 4th ed., 312—327.

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CHAPTER IX.

Estoppel in connection with Companies.

Estoppel by conduct—No estoppel where contract foreign to purposes of incorporation—Contracts *ultra vires* illustrated—Agency—Part-performance—Estoppel in connection with Companies classified—(*a*) As to membership and retirement—(*b*) As to the register—(*c*) As to the issuing of certificates of shares—(*d*) As to debentures irregularly issued—(*e*) Issue of paid-up shares—(*f*) Negligence on the part of members of a Company—(*g*) Effect of Company's seal—Estoppel by negligence—Effect of agreements not under seal—Part-performance—Ratification—Matters necessary for ordinary business.

Estoppel by conduct.

The principle of estoppel by conduct applies to Corporations as well as to individuals. A Corporation is bound as much as an individual by the wrongful acts of its servants, and the result of misrepresentations by an agent is the same in the case of a Corporation as in the case of an individual.[1]

No estoppel where contract is foreign to purposes of incorporation.

But a distinction must first be drawn as to whether the matter in suit is within the scope of the general powers of the Corporation or *ultra vires* of those powers. Companies may be bound by contracts entered into on their behalf for purposes which have been treated as within the objects of their Acts, or by a continued course of dealing in relation to their shares, but contracts foreign to the purposes for which a Company has been established will not bind it.[2] Such contracts are prohibited by implication, since they would result in an application of the funds for a purpose unconnected with the purpose of incorporation.[3]

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[1] *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. Cas., 331 (376) [1855]; *Houldsworth* v. *City of Glasgow Bank*, L. R., 5 Ap. Cas., 317 (331) [1880]. A person may by estoppel become a Director of a Company. See *The York Tramway Co.* v. *Willows*, L. R., 8 Q. B. D., 685 [1882]; *In re British and American Telegraph Co.*, L. R., 14 Eq., 316 [1872]; *In re Great Oceanic Telegraph Co.*, L. R., 13 Eq., 30 [1871]. The right of a Corporation to sue for a wrong is in general the same as that of a natural person. See *South Hetton, &c., Co.* v. *North-Eastern News Association*, L. R., '94, 1 Q. B., 133.

[2] *Eastern Counties Railway Co.* v. *Hawkes*, 5 H. L. Cas., 331 (381).

[3] *Mayor of Norwich* v. *Norfolk Railway Co.*, 4 El. & Bl., 397 (413) [1855]. See *Attorney-General* v. *Great Northern Railway Co.*, 1 Dr. & Sm., 154 (159, 160) [1860], where the reason is well stated.

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Contracts ultra vires illustrated.

In re the Companies Acts, Ex parte Watson[1] illustrates the above principle. There one Watson had advanced money to a Building Society upon the security of the promissory notes of the Directors. The Society as then constituted had no borrowing powers, but subsequently acquired borrowing powers, when the representative of Watson received from the Directors a deposit note under the seal of the Society for the amount due, stating the sum to have been lent on the date of the deposit note. In a claim by the representative to rank against the assets of the Society, the Court held that there was no estoppel against the Society to dispute the validity of the deposit note, it being well established that a corporate body cannot be estopped by deed or otherwise from shewing that it had no power to do that which it purports to have done ;[2] and that the deposit note had been given in discharge of an invalid debt. It made no difference that the parties acted in perfect good faith. "They are bound by the law, though they did not understand it." And persons dealing with a Corporation having limited powers of borrowing are put upon enquiry whether that limit is being exceeded.[3]

In *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.*,[4] it was held that Directors by assenting to entries in a banker's pass-book which, as between individuals *sui juris*, would have established the payment of the sums borrowed, could not bind a Society which had borrowed money, and that the acts of the Directors were not to be considered the acts of the Society.

No estoppel against an Act of Parliament.

The rule may be stated in another form, namely, that there can be no estoppel in the face of an Act of Parliament.[5] The cases of *Hill* v. *Manchester and Salford Waterworks Co.*[6] and *Horton* v. *Westminster Improvement Commissioners*[7] were cases of estoppel by deed, the defendants being held estopped by their own solemn acts from denying that certain sums were lent them by the plaintiff. It seems, however, to be clear that they might have opened the

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[1] L. R., 21 Q. B. D., 301 [1888]. See *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, L. R., 18 Q. B. D., 714 [1887].

[2] See *Fairtitle* v. *Gilbert*, 2 T. R., 169 [1787].

[3] See *Chapleo* v. *Brunswick Building Society*, L. R., 6 Q. B. D., 696 [1881].

[4] I. L. R., 22 Ch. D., 61 (70) [1882].

[5] See *Barrow's case*, L. R., 14 Ch. D., 441, *per* Bacon, V. C.: *Fairtitle* v. *Gilbert*, supra: and as to public matters, see *MacAllister* v. *Bishop of Rochester*, L. R., 5 C. P. D., 194 (203) [1880].

[6] 2 B. & Ad., 544 [1831].

[7] 7 Exch., 780 [1852].

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estoppel by shewing that the bonds were inconsistent with the statutes under which they professed to act.[1]

If the undertaking is within the general scope of the powers of the Corporation the question is generally one of agency, and the rule of estoppel by conduct may apply. If the other contracting party had no notice of irregular acting on the part of the Corporation, the defence of irregularities and the omission of requirements is not open to the Corporation. The case is sometimes strengthened by some representation on the part of the Company to the effect that the contract conforms to the requirements of law.[2] The doctrine of part-performance applies where a Corporation has allowed a party with whom it is dealing to perform his share of an agreement, and by the acts of its servants has permitted the agreement to pass from the executory stage to that of a complete or executed contract. Where there has been part-performance on the one side or ratification on the other, and a Corporation, having taken the benefit of an agreement, seeks to repudiate it on the ground of irregularity, such attempted repudiation amounts to a fraud, which a Court of Equity will not suffer to prevail.[3]

Agency.

Part-performance.

The Indian cases afford little assistance, but the Indian Companies Act (VI of 1882)[4] reproduces the English Acts,[5] and the same estoppels may arise. These may be briefly noticed under the following heads :—

Estoppels in connection with Companies classified.

(*a*) As to membership and retirement.

i. A person may by estoppel become a member of a Company, although the conditions precedent to his being made a member have not been formally observed, where he has acted as a shareholder, and the Company by their acts have treated him as such.

Membership.

ii. Similarly, a person who has not formally retired from membership may by estoppel cease to be a member where the

Retirement.

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[1] See *per* Baron Parke, 2 B. & Ad., 553 [1831].

[2] Bigelow on Estoppel, 5th ed., 461—470.

[3] See *Melbourne Banking Corporation* v. *Brougham*, L. R., 4 Ap. Cas., 156 (169) [1878]. See *Mayor of Kidderminster* v. *Hardwick*, L. R., 9 Ex., 13 (18) [1873]; *Ecclesiastical Commissioners* v. *Merral*, L. R., 4 Ex., 162 [1869]; *Wood* v. *Fate*, 2 B. & P. (N. R.), 247 [1806] ; *Fishmongers' Company* v. *Robertson*, 5 M. & Gr., 131 [1843] ; *Copper Miners of England* v. *Fox*, 16 Q. B., 229 ; 20 L. J. (Q. B.), 174 [1851], as to part-performance and ratification.

[4] Repealing Act X of 1866.

[5] 25 & 26 Vict., 89 ; 30 & 31 Vict., c. 131 ; 40 & 41 Vict., c. 26.

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Company have ceased to recognise him as a member, and where by his conduct he has evinced an intention to retire.

Estopped by conduct.

In the above instances the general rules as to estoppel by conduct will apply against either the Company or the shareholder, the Company being precluded from denying that he is a member, or that he has ceased to be a member, and the shareholder being estopped from denying or asserting his membership, as the case may be.[1]

Bombay decisions.

Some of the leading features of the subject are discussed by Westropp, J., in the Bombay cases presently to be noticed, where also the English decisions prior to 1867 are observed upon.[2]

Definition of "member."

Members are defined to be the subscribers of the Memorandum of Association, and every other person who has agreed with the Company to become a member and whose name is entered on the register.[3]

Between individuals and Companies.

The estoppel against individuals may be illustrated by numerous cases. The payment of calls,[4] the signature of a proxy by a purchaser of shares informally transferred,[5] notice of the sale given to the Company by a purchaser[6]—have been held under certain circumstances sufficient. The non-execution of the Company's deed of settlement has been held a defence even where calls were paid.[7]

Neither can a Company as against members avail itself of informalities in the transfer of shares where the Company itself has recognised such transfer and others have acted on the faith of it;[8]

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[1] See Lindley on Companies, 5th ed., 43—57, 421, 757, where the subject is minutely examined.

[2] *In re East Indian Trading and Banking Co.*, 3 Bom. H. C. (O. C.), 113; *In re Mercantile Credit and Financial Association, Ex-parte Dalvi*, 3 Bom. H. C. (O. C.), 125 [1866].

[3] Indian Companies Act (VI of 1882), s. 45.

[4] *Burnes* v. *Pennell*, 2 H. L. Cas., 497 [1849].

[5] *Sheffield and Manchester Railway Co.* v. *Woodcock*, 7 M. & W., 574 [1841]. See also *Cheltenham Railway Co.* v. *Daniel*, 2 Q. B., 281 [1841]; *Birmingham, Bristol, &c., Railway Co.* v. *Locke*, 1 Q. B., 256 [1841]; *London Grand Junction Railway* v. *Graham*, 1 Q. B., 271 [1841]; *Cromford & High Peak Railway Co.* v. *Lacey*, 3 Y. & J., 80 [1829].

[6] *Cheltenham & Great Weastern Union Railway* v. *Daniel*, 2 Q. B., 281 [1841].

[7] *Irish Peat Co.* v. *Phillips*, 1 B. & Sm., 598 [1861]. See *Waterford, Wexford, &c., Railway Co.* v. *Pidcock*, 8 Ex., 279 [1853]; *Carmarthen Railway Co.* v. *Wright*, 1 Fos. & Fin., 282 [1858]. See also *Coleman's case*, 1 DeG. J. & Sm., 495 [1863].

[8] *Taylor* v. *Hughes*, 2 Jo. & Lat., 24 [1844]; *Bush's case*, L. R., 6 H. L., 37, and L. R., 6 Ch. Ap., 246 [1870]; *Grady's case*, 1 DeG. J. & Sm., 488 [1863]; *Bargate* v. *Shortridge*, 5 H. L. Cas., 297 [1855]; *Straffon's Executor's case*, 1 DeG. M. & G., 576 [1852]; *Lane's case*, 1 DeG. J. & S., 504 [1863].

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even where shares have been improperly issued they may be treated as existing where a shareholder has acted upon them.[1]

Where, however, there has been a mistake through ignorance, and a Company has registered an improper transfer, but not so as to induce others to act upon it, no estoppel arises. It is, of course, otherwise where persons have *bonâ fide* purchased shares on the faith of a Company's register or certificate.[2] Exception.

As between a creditor of the Company and a person who is sought to be treated as a member, the rule of conduct operates to create an estoppel where a person not a shareholder has been treated by the Company as if he were one, but does not operate so as to prevent a creditor from proceeding against a shareholder, who, though not formally retired, has been treated as having done so by the Company's servants.[3] Between creditors and shareholders.

The Indian case-law on the subject remains to be noticed.

In re East Indian Trading and Banking Co.[4] *Jamnadas Savaklal's case*,[4] and the following case, decided before the Indian Companies Act, are nevertheless valuable, as the English cases are examined and followed. In the first case, one Jamnadas, the allottee of 25 shares in a Company registered under Act XIX of 1857, signed the Memorandum and Articles of Association, and paid the first call on the 28th September 1863, on which day he sold the 25 shares to Bhagvandas, the Chairman of the Company. Bhagvandas had made an arrangement with Pranjivandas, another Director, and two other persons who were members of the firm of Bhiku Babaji and Co., the Managing Agents of the Company, to buy 2,800 of the Company's shares, expecting that the market would rise. Upon these shares being divided, the 25 shares bought from Jamnadas came into the hands of Bhagvandas. The two Vendor of shares neglecting to obtain transfer to purchaser held liable as contributory.

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[1] *Challis's case*, L. R., 6 Ch. Ap., 266 [1868]; *Hart* v. *Frontino*, L. R., 5 Ex., 111 [1870]; *Hare's case*, L. R., 4 Ch. Ap., 503 [1870].

[2] See *Simm* v. *Anglo-American Telegraph Co.*, L. R., 5 Q. B. D., 188 [1879]; *Hare* v. *L. & N. W. Ry., Co.*, Johns, 722 [1860]; *Shropshire Union Ry. Co.* v. *The Queen*, L R., 7 E. & I., Ap., 496 [1875]; *Ward* v. *S. E., Ry. Co.*, 2 E. & E., 812 [1860]; *Bahia & San Francisco Ry. Co.*, L. R., 3 Q. B., 584 [1869]; *Campbell's case*, L. R., 9 Ch. Ap., 1 [1873]. See contra *Bank of Hindustan* v. *Alison*, L. R., 6 C. P., 54, 222 [1870].

[3] Lindley on Companies, 5th ed., 54; *Moss* v. *Steam Gondola Co.*, 17 C. B., 180 [1855]; *Bailey* v. *Universal President Life Assocn.*, I, C. B. (N. S.), 557 [1857]; *Bosanquet* v. *Shortridge*, 4 Ex., 699; *Shortridge* v. *Bosanquet*, 16 Beav., 84; *Bargate* v. *Shortridge*, 5 H. L. Cas., 297 [1855]; *Taylor* v. *Hughes*, 2 Jo. & La., 24 [1844].

[4] 3 Bom. H. C. (O. C.), 113 [1866].

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other Directors were ignorant of the joint purchase. Bhagvandas obtained a certificate for the 25 shares, certifying that Jamnadas was a shareholder, and paid the second call, but the shares were never transferred to his name on the register. The Articles of Association required the consent in writing of the Directors before a transfer could be made. Jamnadas having applied to have his name removed from the list of contributories and the names of Bhagvandas's trustees substituted, Westropp, J., held upon a review of the authorities that the unauthorised acts of Bhagvandas could not bind the Board, and that Jamnadas was liable as a contributory. "Adopting the language of Lord Romilly in *White's case*,[1] observed Westropp, J., "I may say—'Here the transfer takes place in September 1863, and the winding up order is not made till 1866, and there is no quarrel. There is nothing to stop the registration of the transfer; why does not the vendor compel the purchaser to register the shares? He could have done so; but he has taken no steps for that purpose; and assuming,' a point upon which I express no opinion, 'that the purchaser is bound to make good to him the price of the shares, and to indemnify him from all consequences, that is relief to be sought in a suit between those two persons. But in the case before me, I have to regard the rights and condition of the shareholders themselves. How are the shareholders of the Company affected? They say, you were bound to let us know what was the state of the Company at the earliest period, and as you have not thought fit to do so, but have held your peace for a period of three years and done nothing whatever, you cannot complain now; and we insist upon having you on the list of shareholders, you not having taken any step to enforce your right to get the transfer made.'"

Company not allowed to take advantage of its own neglect.

In re Mercantile Credit and Financial Association, Ex parte M. R. Dalvi[2] was a case under the early Companies Acts[3] relating to the neglect by a Company to register the transfer of its shares. The Company purchased certain of its own shares in scrip, but no transfers were executed by the vendors, and the shares continue to stand in the vendors' names. The Company having, by their conduct before and after the purchase, estopped themselves from

[1] L. R., 3 Eq., 86 [1866].

[2] 3 Bom. H. C. (O. C.), 125 [1867].

[3] XIX of 1857, VII of 1860.

taking advantage of their own neglect to register themselves as the holders, it was held that the name of the Company should be substituted for the names of the vendors. Westropp, J., having examined the authorities, none of which in his opinion went so far as in the case before him it was necessary to go, held not without some hesitation, that the Company could not take advantage of their own neglect, or that of their officers, in not registering the shares in the name of the Company, so as to make the original allottees liable.

Membership obtained by misrepresentation.

Anandji Visram v. *Nariad Spinning and Weaving Co.*,[1] though not expressly so decided, appears to go upon the ground of estoppel. The defendant took shares upon the faith of a document purporting to be the memorandum of association. The document actually registered, however, contained a material variance, a provision empowering the Company to subdivide its shares by special resolution. Westropp, C. J., and Sargent, J., held that, even if the provision was illegal, its effect was to alter the position of the defendant, and the Company were not entitled to treat him as a member.

(*b*) As to the register.

Estoppel may be opened by Company or shareholder showing that register is inaccurate.

i. A Company is not necessarily estopped as against a registered transferee of shares from denying that he is a shareholder.[2]

ii. A person whose name has been registered may or may not be estopped from denying that he is a shareholder.

The register is only *primâ facie* evidence as to who the members are,[3] and either the Company, or persons whose names appear on the register, may show that it is inaccurate or imperfect. If there is a valid contract to take shares, the person so contracting may be placed upon the register ; but if there is no binding contract, it is open to him to shew that his name was placed on the register without authority, unless by *laches* he has forfeited his right to repudiate the shares.[4]

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[1] I. L. R., 1 Bom., 320 [1876]. See *Guzerat Spinning, &c., Co.* v. *Girdharlall Dalpatram*, I. L. R., 5 Bom., 425 [1880]; *In re Bombay Electrical Co.*, I. L. R., 13 Bom., 1 [1888]; *Imperial Ice Manufacturing Co.* v. *Munchershaw Barjorji Wadia*, I. L. R., 13 Bom., 415 [1889], as to signature of duplicate memorandum of association.

[2] *Shropshire Union Co.* v. *Anderson*, 3 Ex., 401 [1849]; *Waterford, Wexford, &c.; Ry. Co.* v. *Pidcock*, 8 Ex., 269 [1853].

[3] Indian Companies Act (VI of 1882), s. 60. See Lindley on Companies, 5th ed., 60, 106—108.

[4] *Oakes* v. *Turquand*, L. R., 2 H. L., 325 [1867].

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In the same way a Company having by mistake registered an invalid transfer is not estopped by its register from repudiating the transfer as against the transferee.[1]

Estoppel by register or certificate.

But it may be otherwise where persons have acted on the faith of the register, and it becomes necessary to examine next, in connection with this subject, the case of certificates of shares.

(*c*) As to the issuing of certificates of shares.

Companies issuing certificates, under their common seal, of stock or shares held by any member of a Company, such certificates being *primâ facie* evidence of the title of the member to the shares therein specified,[2] are estopped against persons advancing money, or buying upon the faith of such certificates from denying their accuracy where such persons have sustained loss thereby,[3] although the certificate may have been procured by forgery or fraud.[4]

Ground of the estoppel statutory duty.

The ground upon which the decisions proceed is that where there is a statutory duty to keep a correct register of shares, and the Company, by issuing certificates purporting to specify the holders of shares and their interests as shewn by the register, arm the holders of shares under a forged transfer with the means of holding themselves out to purchasers or vendors as the true holders, the Company is estopped from contesting the accuracy of the register or certificate. The representation by issue of certificates strengthens the estoppel.[5]

Representation strengthening estoppel.

The cases require to be examined briefly.

Case of purchasers of shares upon the faith of certificates obtained by fraud.

In the case of *In re Bahia and San Francisco Railway Co.*[6] certain brokers having in deposit five share certificates belonging

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[1] See *Simm* v. *Anglo-American Telegraph Co.*, L. R., 5 Q. B. D., 188 [1879].

[2] Indian Companies Act (VI of 1882), s. 54, Table "A," Art. (2).

[3] See *Simm* v. *Anglo-American Telegraph Co.*, L. R., 5 Q. B. D., 188 [1879].

[4] *Bahia* v. *San Francisco Ry. Co.*, L. R., 3 Q. B., 584 [1861]; *Hart* v. *Frontino*, L. R., 5 Ex., 111 [1870]; *Shropshire Union Ry. Co.* v. *The Queen*, L. R., 7 E. & I., Ap., 496 [1875]; *Shaw* v. *Port Phillip Mining Co.*, L. R., 13 Q. B. D., 103 [1884], where the Company's seal was fraudulently affixed by the Secretary to a certificate in favour of himself, and the signature of one of the Directors was forged. See as to the estoppel upon a Corporation by reason of the negligence or fraud of its servants. *Mayor, &c., of the Staple of England* v. *Governor of Bank of England* L. R., 21 Q. B. D., 160; and other cases cited below. See an article on Certificates, and Certification, Law Times (p. 358) Aug. 19, 1893.

[5] See Lindley on Companies, 5th ed., 64, 484.

[6] L. R., 3 Q. B., 584 [1868].

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to a registered holder T, fraudulently transferred the shares to S and G, and deposited a forged transfer, together with the certificates, with the Secretary of the Company, who in the usual course of business after writing to T and receiving no answer, registered the transfer and substituted the names of S and G for that of T, furnishing to S and G certificates to the effect that they were the registered holders of five shares. The shares in question were transferred through brokers on the Stock Exchange to A and B for value, and their names were registered as the holders, share certificates being handed to them. T's name having been ordered to be restored to the register by rule of Court, a special case was stated to determine whether the Company was liable to pay damages to A and B. Under the Statute 25 & 26 Vict., c. 89, the Company were required to keep a *register* of its members with full particulars, and it was provided by the statute that a *certificate* under the common seal of the Company specifying stock or shares held by a member should be *primâ facie* evidence of the member's title, and the register was declared to be *primâ facie* evidence of the particulars therein inserted. The Court of Queen's Bench[1] gave judgment in favour of the claimants upon the principle of *Pickard* v. *Sears*[2] and *Freeman* v. *Cooke*,[3] holding that they were entitled to be placed in the same position as if the shares they purchased had been good shares, the measure of damages being the market-price of the shares or a reasonable compensation to be fixed by a jury.[4]

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[1] Cockburn, C. J., Blackburn, Mellor, and Lush, JJ.

[2] 6 A. & E., 469 [1837].

[3] 2 Ex., 654; 18 L. J. (Ex.), 114 [1848].

[4] "The power of giving certificates," said Cockburn, C. J., "is for the benefit of the Company in general; and it is a declaration by the Company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the Company, and it is given by the Company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares." "The first thing the Company would have to do," said Blackburn, J., "when the transfer was tendered to them, would be to enquire into its validity. . . . If they have been deceived, and the statement is not perfectly true, they may not be guilty of negligence, but the Company and no one else have power to enquire into the matter; and it was the intention of the Legislature that these certificates should be documents on which buyers might safely act." L. R., 3 Q. B., 595, 596. As to the estoppel by issuing certificates, see further *Tomkinson* v. *Balkis Consolidated Co.*, L. R., 2 Q. B., '91, 614, distinguishing *Bishop* v. *Balkis Consolidated Co.*, L. R., 25 Q. B. D., 512 [1890], explaining *Derry* v. *Peek*, L. R 14 Ap. Cas., 337, and referring to the

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Rule otherwise if purchaser or lender has acted upon a forged transfer and not upon the faith of the certificate itself.

But in order to generate an estoppel, it must be clear that the person alleged to have suffered loss has acted on the faith of the validity of the certificate or of the registration.

In *Simm* v. *Anglo-American Telegraph Co.*,[1] one Phillips, clerk to Coates, who was the owner of stock in the defendant Company, forged a transfer of the stock, and Burge became the ultimate buyer. Burge sent this transfer to the Company, who registered it after making enquiries of Coates, which were intercepted by Phillips. Subsequently Simm accepted the stock as trustee for Burge subject to any lien the National Bank might have thereon. The Company registered Simm as transferee of the stock and issued a certificate to him. The Bank made advances to Burge upon the security of the stock, which were repaid before action brought. The forgery by Phillips having been discovered, Coates claimed to be the proprietor of the stock, and the Company refused to recognise Simm. Simm and Burge then brought an action against the Company for wrongfully representing that Simm was the registered holder of the stock, and as such had title to transfer and sell the same, and for the recovery of the purchase-money of the stock or the dividends thereon. They contended that Simm as trustee for the Bank had acquired a title by estoppel against the Company, the Bank having advanced money to Burge on the faith of the transfer to Simm; and that the Company, having registered Simm's name and issued a certificate to him, could not refuse to recognise his title. Lindley, J., held that, there being no negligence on either side, and a statutory duty being imposed upon the Company to keep their register correct, and look after the transfers between innocent parties, the loss must fall upon them. The Court of Appeal[2] reversed this decision on the ground that, although Simm might have acquired a title by estoppel *had the Bank incurred loss on the faith*

Simm v. Anglo-American Telegraph Co. [1879].

previous cases. This case was affirmed by the House of Lords; see *Balkis Consolidated Co.* v. *Tomlinson* [1893], A. C., 396, where the authorities are fully discussed.

[1] L. R., 5 Q. B. D., 188 [1879]. But in *Foster* v. *The Tyne, &c., Co.*, 63 L. J., Q. B., 50, [1893], it was held *per* Collins, J., that the issuing of dividend warrants did not amount to a representation of the transferee's title, though this would seem to be a stronger circumstance than the merely ministerial registration in *Simm's* case.

[2] Bramwell, Brett and Cotton, L. J. J., referring to *In re Bahia and San Francisco Ry. Co.*, L. R., 3 Q. B., 584; *Hart* v. *Frontino, &c., Gold Mining Co.*, L. R., 5 Ex., 111; and distinguishing *Knights* v. *Wiffen*, L. R., 5 Q. B., 660.

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of the certificate issued to him, that title ceased when the loan was paid off, and no estoppel existed in favour of Burge, he *having acted upon the faith of the forged transfer and not upon any representation by the Company*. He had in fact induced the Company to recognise his nominee as the holder, and therefore no action would lie.

Irregularity in issuing debentures.

(*d*) As to debentures irregularly issued.

Webb v. *Herne Bay Commissioners*[1] is an illustration of the principle. There the plaintiffs sued upon certain debentures issued by Commissioners appointed under a local Act. The debentures were issued, in payment of bricks supplied for the construction of buildings necessary for the purposes of the Act by one Halket, who being a Commissioner himself was prohibited under the Act from entering into the contract. Halket parted with the debentures to the testator of the plaintiffs, who were therefore in the position of assignees of the original holder, and were ignorant of any illegality in the transaction. Upon a case stated, the Court[2] of Queen's Bench held that the Commissioners knew from their Act that the mortgages so executed might be transferred to other persons on the faith of the matters stated in them, and the plaintiffs were therefore entitled to have the funds of the Commissioners applied in payment of the interest due on the debentures, as required by the Act of incorporation.

The learned Judges in that case rest their judgments upon the general doctrine of estoppel as laid down in *In re Bahia and San Francisco Ry. Co.*[3] and the earlier cases. The Commissioners, having stated on the face of the debentures that Halket had lent money for the purposes of, and upon the credit of, the Commissioners, were estopped from denying the truth of that statement as against his *bonâ fide* transferees.

In the case of *In re Romford Canal Co.*[4] the estoppels arising against Companies in respect of debentures irregularly issued are thus summarised :—"Where a Company have power to issue securities, an irregularity in the issue cannot be set up against even the original holder, if he has a right to presume *omnia rite*

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[1] L. R. 5 Q. B., 642 [1870].

[2] Cockburn, C. J., Blackburn, Mellor and Lush, JJ.

[3] L. R., 3 Q. B., 584 [1868].

[4] L. R., 24 Ch. D., 85 (92, 93) [1883], *per* Kay, J.

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acta: *Fountaine* v. *Caermarthen Railway Co.*[1] If such security be legally transferable, such an irregularity, and *à fortiori*, any equity against the original holder, cannot be asserted by the Company against a *bonâ fide* transferee for value without notice: *Webb* v. *Commissioners of Herne Bay*.[2] Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the Company in issuing the security, or by their subsequent dealing with the transferee, he has a superior equity: *In re Agra and Masterman's Bank*;[3] *In re Blakely Ordinance Co.*;[4] *Dickson* v. *Swansea Vale, &c., Co.*[5] There remains the present case, in which I must treat the parties as equitable transferees only of securities, which the Company, having power to issue such, represent on the face of them to be legally transferable, and where the Company would be able to plead at law against the original holder or the first transferee, that the debentures were invalid because issued by an insufficient meeting of shareholders. I think the decision of *Higgs* v. *Northern Assam Tea Co.*[6] warrants me in saying that if the original conduct of the Company in issuing the debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity, on the part of any person who had agreed for value to take a transfer of these debentures, to restrain the Company from pleading their invalidity, although that might be a defence at law to an action by the transferor." The above summary presupposes—(1) that the Company had power to issue debentures which would be transferable at law; and (2) that the equitable transferee had no reason to suspect any irregularity in the issue.

In re Romford Canal Co. [1883].

Liquidator may be estopped.

In the case of *In re South Essex Estuary Co., Ex parte Chorley*,[7] bonds were given by a Company to their contractor who assigned them to the plaintiff, and he recovered principal and interest due upon the bonds in two suits against the Company. The Company being wound up, it was held that, whether the bonds were invalid or not in the hands of the contractor, the official liquidator was

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[1] L. R., 5 Eq., 316 [1868].
[2] L. R., 5 Q. B., 642 [1870].
[3] L. R., 2 Ch. Ap., 391 [1867].
[4] L. R., 3 Ch. Ap., 154 [1867].
[5] L. R., 4 Q. B., 44 [1868].
[6] L. R., 4 Ex., 387 [1869].
[7] L. R., 11 Eq., 157 [1870].

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precluded by the conduct of the Company from questioning their value in the hands of a *bonâ-fide* purchaser.

(*e*) Estoppel by issue of paid-up shares.

Issue of paid-up shares.

As against *bonâ fide* purchasers for value without notice a Company will be estopped from shewing that shares issued by it as paid up were not so paid up.

In *Burkinshaw* v. *Nicholls*,[1] a Company issued shares as "fully paid up," and also certificates and returns describing them as such. Upon a contract to purchase a mill and machinery the Company made part-payment to the vendor in "fully paid-up" shares. These shares ultimately passed into the hands of Nicholls, whose name was entered on the register of the Company as the holder of these shares which were not in fact paid up. The Company being wound up, Nicholls was placed upon the list of contributories. The House of Lords held, affirming the order of the Lords Justices, that the official liquidator was not entitled to call upon Nicholls for the payment of the amount of capital represented by the shares. Lord Cairns observed: "It would paralyse the whole of the dealings with shares in public Companies if, a share being dealt with in the ordinary course of business, dealt with in the market with the representation upon it by the Company that the whole amount of the share was paid, the person who so took it was to be obliged to disregard the assertion of the Company, and before he could obtain a title, must go and satisfy himself that the assertion was true, and that the money had been actually paid."[2]

(*f*) Negligence on the part of members of a Company.

Proximate negligence.

On the other hand, shareholders guilty of negligence in permitting others to deal with share certificates or transfers may be estopped as against a Company from denying the title of such third persons, where their own negligence has been the proximate cause of a fraud. The mere fact of carelessness, however gross, will not raise an estoppel unless the carelessness is in the transaction itself and the transferee has thereby been misled. The common case is where the owner of shares has signed

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[1] L. R., 7 Ch. D., 533, sub-nom. *In re British Farmers' Pure Linseed Cake Co.*, (S. C.) L. R., 3 Ap. Cas., 1004 [1878].

[2] *Ib.*, 1017.

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transfers in blank and entrusted them to a broker together with the documents of title.[1]

The principles applicable to these cases are identical with those which govern the case of estoppel against a Company by reason of the negligence of its servants, which case will be examined shortly.

Negligence of shareholder executing transfers in blank.

In *Swan* v. *The North British Australasian Co.*[2] the plaintiff, intending to sell and transfer certain shares in another Company, was induced by his broker to execute a blank transfer in order that those shares might be transferred to the vendee. The broker fraudulently filled in the numbers and description of shares which the plaintiff held in the defendant Company, which shares could only be transferred by deed, and which the plaintiff did not intend to sell, and by theft of the certificates of these shares induced the Company to register the deed as a genuine transfer, and delivered the transfers with the certificates to *bona fide* purchasers for value. The defendants, on the transfers and certificates being delivered to them, removed the plaintiff's name from their register and substituted the names of the purchasers. The plaintiff sued to have his name replaced upon the register. A verdict was entered for the plaintiff, subject to the opinion of the Court upon a special case stated.[3] The Court of Exchequer differed in opinion. Pollock, C. B., and Wilde, B., holding that the plaintiff was estopped by conduct of culpable negligence, and that the forgery was the proximate cause of the plaintiff's own careless conduct; while Martin, B., and Channell, B., were of opinion that such negligence was separated from the execution of the alleged transfer by the felonious acts of the broker which were in fraud of the plaintiff, and that the act of the plaintiff was too remote to afford a cause of action.* The Court

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[1] See *Tayler* v. *Great Indian Peninsular Ry. Co.*, 4 DeG. & J., 559 [1859]; *Swan* v. *North British Australasian Co.*, 2 H. & C., 175 [1863].

[2] 7 H. & N., 603; 2 H. & C., 175 [1863].

[3] Upon reference to the judgment of Channell, B. [7 H. & N., 652], it appears that the Court of Common Pleas granted a rule calling upon the defendant Company to shew cause why the plaintiff's name should not be placed upon the register, and the rule was amended so as to include the then registered holders of the shares which formerly stood in the plaintiff's name. The case was then argued twice when the Court of Common Pleas were equally divided. A similar rule was then obtained in the Court of Exchequer, which was enlarged so as to admit of an appeal to a Court of error, and an action was accordingly brought, and a special case stating the facts settled between the parties. The question argued in the Court of Exchequer was in substance the same as that before the Common Pleas. The case in the Common Pleas is reported in 7 C. B. (N. S.), 400.

being equally divided in opinion, the case was ar gued in the Exchequer Chamber before seven Judges. The Court (Cockburn, C. J., Crompton, Willes, Byles, Blackburn, and Mellor, JJ., Keating, J., dissenting) were of opinion that the transfers were void and that, assuming the plaintiff's negligence, that negligence was not the proximate cause of the transfer by the defendants.[1] The plaintiff was, therefore, not estopped. The rule as to Negotiable Instruments, as already pointed out, stands upon different grounds.[2]

(*g*) Effect of the Company's seal.

Estoppel by negligence.

Acts of agent or servant.

Rule stated.

The first question for consideration is to what extent Corporations may be estopped from denying the acts of their agents or servants having the charge of their corporate seal. In early times great precautions were taken for the custody of seals.[3] The rule now appears to be that a Corporation may become liable for neglect by reason of carelessly entrusting its corporate seal to an agent, only where that neglect has been the proximate cause of loss to some other person.

Bank of Ireland *v.* Evans' Charities [1855].

The Governor and Company of the Bank of Ireland v. *Trustees of Evans' Charities*[4] is a leading case on the subject. One Grace, the secretary of certain trustees, being in possession of their common seal, unauthorisedly affixed the seal to five several powers-of-attorney, and obtained the transfer of certain stock belonging to the trustees. On the fraud being discovered, the trustees endeavoured to obtain the stock, when the Bank refused to transfer the same. The case came before the House of Lords upon a writ of error when the authorities were fully argued. Their Lordships held that the supposed negligent custody of their seal by the trustees in leaving it in the hands of Grace, who was thereby enabled to commit a fraud, was not negligence in, or immediately connected with, the transfer itself, such as would deprive the plaintiffs

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[1] This point is very clearly put in the judgment of Byles, B., "Between the plaintiff entrusting Oliver (the broker) with the blank transfers, and the actual transfer by the defendants a series of causes intervened. First, the fraudulent secretion of the duplicate key by Oliver; next, the trespass and larceny by Oliver in opening the box and stealing the securities; and, lastly, the treble forgery committed by Oliver in inserting the subject-matter of the transfer and the names of both the attesting witnesses" [2 H. & C., 186].

[2] *Supra*, Chapter VIII.

[3] The early history of the subject is set out in the judgment of Wills, J., in *Mayor, &c., of Merchants of the Staple of England* v. *Governor and Company of the Bank of England*, L. R., 21 Q. B. D., 165—168 [1887].

[4] 5 H. L. C., 389 (410, 413) [1855].

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of their right to insist that the transfer was invalid; the case being thus distinguished from *Young* v. *Grote*.[1] "The present case," said Baron Parke, "is entirely different. If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of the negligence. It never would have been, but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed. . . . If such negligence could disentitle the plaintiffs, how far is it to go? If a man should lose his cheque book or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?" And Cranworth, C., observed: "I think it has been fairly put that there must be either something that amounts to an estoppel, or something that amounts to ratification, in order to make negligence a good answer."

In the case of *The Mayor, Constables, and Company of Merchants of the Staple of England* v. *The Governor and Company of the Bank of England*,[2] one Drew, clerk to the plaintiffs, who were an ancient Corporation, who had no office or place of business, and no books except a minute book kept by Drew, sealed with the seal of the Company two powers-of-attorney under which certain stock, the property of the plaintiffs, was sold. The plaintiffs claimed a declaration that the stock had been transferred by the defendants without the plaintiffs' authority. The jury found that the plaintiffs had been guilty of negligence. Upon motion to enter judgment, the Queen's Bench Division[3] held, upon the authority of the *Bank of Ireland* v. *Trustees of Evans' Charities*,[4] that the plaintiffs' negligence did not disentitle them to succeed. This

Mayor, &c., of the Staple v. Bank of England [1887].

[1] 4 Bing., 253 [1827]. See this case discussed, *supra*, pp. 174, 176.
[2] L. R., 21 Q. B. D., 160 [1887].
[3] Day and Wills, JJ., pp. 161–170.
[4] 5 H. L. C., 389.

decision was upheld by the Court of Appeal,[1] distinguishing between negligence generally and negligence in or immediately connected with the transfer itself, the latter species of negligence only being sufficient to deprive the plaintiffs of their right to recover. Upon this view of the principles enunciated in *The Bank of Ireland* v. *Trustees of Evans' Charities*,[2] and *Swan* v. *North British Australasian Co.*,[3] their Lordships held the case to be covered by authority.

Effect of agreements not under seal.

The next question for consideration is the effect of agreements not under seal. At Common Law, Corporations could only bind themselves by contract under their corporate seal. The exception to be first noticed relates to agreements, not under seal, which have been performed in part, where the circumstances are such that the Court would decree specific performance as between individuals. This application of the doctrines of part-performance and ratification has been noticed above. The second exception relates to small matters necessary for the ordinary business for which the Company has been formed.

Part-performance.

In the following cases the principle is that of estoppel by conduct. In *Crook* v. *Corporation of Seaford*[4] the plaintiff filed a bill for specific performance of an agreement by the defendants, a Municipal Corporation, in 1860 to let to him certain land described as "the frontage of West Gun Field, with the flat part of the beach opposite (to be stumped out at the expense of Mr. Crook)." The plaintiff claimed the land included between lines drawn in prolongation of the sides of his field down to the sea-coast, and stumped out the land in accordance with his view, building a sea wall and a terrace along the land claimed by him. The defendants gave Crook notice to quit in 1864, and commenced an action of ejectment in 1869. It was contended in the Chancery proceedings that the Corporation could not be bound by an agreement not under seal. Stuart, V. C., made a decree for specific performance.[5] Upon appeal Lord Chancellor Hatherley said: "The plaintiff was allowed to go on, and spend a large sum of

Corporation estopped from pleading informality.

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[1] Esher, M. R., Bowen and Fry, L. JJ., L. R., 21 Q. B. D., 170—177.

[2] 5 H. L. C., 389.

[3] 2 H. & C., 175. *See* also *Young* v. *Grote*, 4 Bing., 253; *Arnold* v. *Cheque Bank*, L. R., 1 C. P. D., 578.

[4] L. R., 6 Ch. Ap., 551 [1871].

[5] L. R., 10 Eq., 678.

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money upon the wall and terrace and to remain in possession of what he had improperly taken, whilst the Corporation received the rent of 10*s.*; though no doubt there was some dissatisfaction expressed as to the proceedings of the plaintiff. The wall built by him, moreover, did no harm unless it interfered with his neighbours; and, as far as the Corporation were concerned, the greater length of wall he built the better it was for the town... A Court of Equity could not allow the ejectment to proceed after the plaintiff had spent so much money on the wall, although he did raise a contention as to which he was in the wrong. Upon this bill being filed the Corporation raised several objections, one of which was that the agreement was not under seal. But a Corporation, although it may not have eyes to see what is going on, has agents who can see; and if a Corporation allow a wall to be built and money to be expended on the faith of a resolution regularly entered in their books, they must be answerable."

Goodrich v. Venkanna [1878].

Estoppel raised in favour of Corporation.

Crook v. *The Corporation of Seaford*[1] has been followed by the Madras High Court in the case of *Goodrich* v. *Venkanna*[2] where the objection as to the absence of the seal was taken with a view of escaping the contract which the Corporation were seeking to enforce. There an agreement, not under seal, was entered into between the Municipal Commissioners of the town of Vizianagram and the defendant, who farmed the tolls leviable upon carriages entering the town during the space of one year, and agreed to pay the sum of Rs. 8,110 by monthly instalments. The defendant, upon suit being brought at the end of the year to recover a balance of Rs. 1,497-8-0, pleaded that carts were prevented from entering the town by order of the Magistrate on account of cholera, and raised amongst others the defence that the agreement was not duly sealed and attested as required by Madras Act III of 1871. The Court[3] held, upon the authority of the cases cited by Byles, J., in *South of Ireland Colliery Company* v. *Waddle*,[4] that it was unnecessary to consider whether the absence of the seal and attestation would afford a defence, inasmuch as the plaintiff had fully

[1] L. R., 6 Ch. Ap., 551.
[2] I. L. R., 2 Mad., 195 [1878].
[3] Kernan and Forbes, JJ.
[4] L. R., 3 C. P., 473 [1868]. See *Fishmongers' Company* v. *Robertson*, 5 M. & G., 131 [1843]; approved in *Australian Royal Mail Steam Navigation Co.*, v. *Marrett*, 11 Ex., 228 (235); 24 L. J. (Ex.), 273 [1855], by Martin, B.

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performed all things to be performed on his part and both parties had acted under the agreement, the defendant having had the full benefit of the contract by receiving the tolls. It would be contrary, therefore, to "equity and good conscience" to allow such a defence. If the Corporation were bound, as it was clear they would be, having given possession of the tolls and received payments under the contract, then it was clear that the defendant who had signed must also be bound. The case of *Crook* v. *The Corporation of Seaford*[1] is cited as showing that the rule applied against a Corporation and in relief of those who have expended money upon the faith of an informal agreement, also operates for the benefit of a Corporation which has fully performed all things to be performed on its part.

Ratification.

Wilson v. *West Hartlepool Railway Co.*[2] illustrates the meaning of ratification. That was a suit for the specific performance of an agreement entered into by an agent of a Railway Company to sell to the plaintiff a certain piece of land. Upon the contract being entered into, machinery belonging to the plaintiff was brought by the Company's waggons and deposited on the land which was measured by an officer of the Company, and plaintiff was let into possession. The Company laid down lines of rails between the land and their main line of railway, and also made borings in the land. These acts were all done in conformity with the contract, the intention of the contracting parties being that the plaintiff, who proposed to erect ironworks on the land, should use the defendants' railway in preference to others. The Company refused to complete the sale on the ground that their agent had contracted without authority. The Master of the Rolls[3] having held that the Company had ratified their agent's contract by acts in the nature of part-performance, and having ordered specific performance of the contract, the Lords Justices differed in opinion, and the appeal was therefore dismissed. Knight Bruce, L. J., considered that the agreement contained provisions excluding specific performance. Turner, L. J., examined the doctrines of ratification and part-performance as illustrated by the

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[1] L. R., 6 Ch. Ap., 551.
[2] 2 D. J. & S., 475; 34 L. J. (Ch.), 241 [1865].
[3] Sir John Romilly.

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circumstances of the case, holding that the acts of the defendants amounted to a representation by them to the plaintiff that the contract was valid and subsisting, and amounted in effect to a part-performance of it.

Matters necessary for ordinary business.

The second exception noticed above is that, for the purpose of carrying out the ordinary business for which a Corporation has been formed, it has power to bind itself without a contract under seal in small matters necessary for the ordinary business of the Corporation. Where the nature of the Corporation is such that, periodically or at frequent intervals, small transactions must occur, it would be perhaps impossible that each of such small contracts, should be under seal.[1]

Authority of Agent of Company.

It should be observed generally that the mere fact that the person making representations is a servant or agent of a Corporation will not, in the absence of express authority or of any course of business from which authority can be inferred, raise an estoppel where such representations were not within the scope of his authority.[2]

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[1] See *Hunt* v. *Wimbledon Local Board*, L. R., 4 C. P. D., 56 [1878], where the meaning of the expression 'taking the benefit of the contract' is also discussed. The decision in that case was on the ground that it was *ultra vires* of the Corporation to make a contract exceeding £50 in value not under seal.

[2] *Barnett Hoares & Co.* v. *The South London Tramways Co.*, L. R., 18 Q. B. D., 815 [1887]; *Newlands* v. *The National Employers' Accident Association*, 54 L. J. (Q. B. D.), 428 [1885].

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CHAPTER X.

Matter in Writing.

Estoppel by matter in writing—The seal—Modern doctrine rests upon contract—Estoppel by Representation—The substance of the transaction and the position of the parties are to be regarded—Special reason for this rule in India—Requirements of the Registration law—Classification—1. Deeds generally to be construed only as evidence—The Courts are hostile to technicalities—2. Estoppels must be made out clearly—Estoppel manifest upon the face of the deed—No estoppel upon invalid document—3. The consideration for a deed is essentially matter of proof—Rule acted upon in India—Stipulation in bond—Rule in England—Acknowledgment of receipt as between parties—Estoppel where another party has altered his position—Unpaid vendor parting with deed reciting that purchase-money has been paid—Mortgagor acknowledging receipt of mortgage-money, estoppel against—4. The effect to be attached to recitals—Does the recital express the bargain upon the faith of which the parties acted?—The contract is to be looked to—Cases where recitals held not conclusive—Recitals *primâ facie* evidence, but may be explained—5. Can one of the parties to a fraud against third persons shew the truth as against the other when the illegal object has been affected?—Rule in England—Rule in Calcutta not uniform—*Sreemutty Debia Chowdhrain* v. *Bimola Soonduree* [1874]—Rule in Allahabad—*Param Singh* v. *Lalji Mal* [1877]—Rule in Bombay—*Chenvirappa* v. *Puttappa* [1887]—Indian Trusts Act, s. 84—6. Other topics—(*a*) Title by Estoppel—Principle applied to mortgages—(*b*) Attestation of deed how far evidence of assent—Destroying or refusing to receive a document—Signature—Pardanashin—(*c*) Documents which may raise an estoppel—Invoice—Warehouse receipts and delivery orders—Mercantile meaning—Bills of lading—Difference note—(*d*) Estoppel arising out of Accounts—Principle of election—Bankers' Pass Books—Ship's Register, Flag and Pass—(*e*) Awards and agreements to refer to arbitration—Tribunal appointed by the parties—Interest reipublicae ut sit finis litium—Award invalid in part may yet have legal validity—But is conclusive only upon the points in dispute—Submission to and award by Panchayet—The contract between the parties is to be regarded—Provisions of Act I of 1877 and Act XIV of 1882.

Estoppel by matter in writing.

Estoppel by Deed or, as it may better be described, Estoppel by Matter in Writing, rested originally upon the idea that written evidence was of a higher and more conclusive nature than verbal. The truth could better be established where the parties had agreed to bind themselves by an act of solemnity, such as the affixing of a seal to a formal document. The form of the contract was of the first importance; formal contracts could alone give rise to actions, and informal contracts were only enforced upon the grounds of necessity and convenience. Contracts under seal

The seal.

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were, therefore, regarded as conclusive between the parties, the seal being a recognised and infallible method of proof.[1]

The old estoppel by deed.

In *Bowman* v. *Taylor*,[2] Taunton, J., states this doctrine: "The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is, whether there is a matter so asserted by the defendant under his hand and seal, that he shall not be permitted to deny it in pleading. It is said that the allegation in the deed is made by way of recital, but I do not see that a statement such as this is the less positive because it is introduced by a 'whereas.'"

The modern doctrine rests upon contract.

The tendency in modern times is to treat Estoppel by Deed as resting upon contract. So in *Carpenter* v. *Buller*,[3] Baron Parke observed: "If a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal and a *contract* is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument, it is not competent for the party bound to deny the recital; and a recital in an instrument *not under seal* may be such as to be conclusive to the same extent.... By his *contract* in the instrument itself, a party is assuredly bound and must fulfil it." And in this view Estoppel by Deed is nothing more than Estoppel by Representation, and is founded upon representations as to existing facts. In order to ascertain whether an estoppel arises it is, therefore, necessary to look to the general effect of the instrument,[4] and to see what the precise representation is, and whether it has been acted upon. What has to be

Estoppel by Representation.

The substance of the transaction and the position of the parties are to be regarded.

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[1] Pollock on Contract, 5th ed., 131—143. Law Quarterly Review, Vol. vi, p. 75.

[2] 2 Ad. & E., 278 (291) [1834]. *See* also *Goodtitle* v. *Bailey*, 2 Cowp., 597 [1777].

[3] 8 M. & W., 209 (212) [1841].

[4] *Per* Jessel, M. R., in *General Finance, &c., Co.* v. *Liberator Permanent Benefit Building Society*, L. R., 10 Ch. D., 15 (24) [1878], referring to *Crofts* v. *Middleton*, 2 Kay & J., 194 [1855]. "Every deed," says Martin, B., in *South-Eastern Railway Co.* v. *Warton*, 6 H. & N., 520 (526) [1861], "must be construed according to that which, looking at the document itself, appears to be the intention of the parties. It is true that in construing a deed the Court cannot look at collateral matters, but the intention of the deed, as appearing on the face of it, must be regarded. The true meaning of the deed is that the *arbitration* shall be confined to the matters specified in the schedule, and the admission is made for the purpose of that deed. A recital in such a deed would be binding *if it was a bargain on the faith of which the parties acted*."

regarded is the substance of the transaction, and in particular the presence or absence of consideration.

Special reason for this rule in India.

The main ground upon which the solemnity of a deed came to be impeached in England was where there was some fundamental error as to the nature of the transaction, or as to the person of the other party, or as to the subject-matter of the agreement. The estoppel being binding as between parties and those claiming under them, it came to be established that fraud or illegality in the instrument and incapacity to contract in the parties might be shewn. And in this country where, outside the Presidency Towns, deeds are generally of a very informal nature, the remarks of Byles, J., in *Foster* v. *Mackinnon*,[1] would seem to apply with great force.

The requirements of the registration law are to be satisfied first.

Before proceeding to examine the subject further, it is necessary to observe that, apart from the special provisions of the law which require certain transactions to be in writing,[2] a registered

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[1] L. R., 4 C. P., 704 (711) [1869]. "It seems plain on principle and authority," observed Byles, J., delivering the judgment of the Court of Common Pleas, "that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the grouud of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign the contract to which his name is appended. The authorities appear to support this view of the law. In *Thoroughgood's case* [2 Co. Rep., 9*b* (26 Eliz.)] it was held that if an illiterate man have a deed falsely read over to him, and he then signs and delivers the parchment, that parchment is, nevertheless, not his deed. . . . The position, that if a grantor or covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him, is supported by many authorities: *See* Com. Dig. Fait (B. 2); and is recognised by Bayley, J., and the Court of Exchequer, in the case of *Edwards* v. *Brown* [1 Cr. & J., 307 (1831)]." See *Simons* v. *The Great Western Railway Co.*, 2 C. B. (N. S.), 620 [1857], where the plaintiff signed a special contract upon the assurance that his signature was a matter of form. *See* as to *pardanashins*, *Ashgar Ali* v. *Delroos Banoo Begum*, I. L. R., 3 Calc., 324 (330) [1877].

[2] "A transfer of property may be made without writing in every case in which a writing is not expressly required by law." Act IV of 1882, s. 9; *see* the same Act, s. 54, as to sales; s. 59, as to mortgages; s. 107, as to leases: s. 123, as to gifts; Act VI of 1882, s. 67, as to Companies; Act II of 1882, s. 5, as to trusts in relation to immoveable and moveable property; Act XXVI of 1881, as to negotiable instruments; Act III of 1877, s. 17, as to (*a*) instruments of gift of immoveable property, (*b*) other non-testamentary instruments dealing with an interest of the value of Rs. 100 and upwards; (*c*) non-testamentary instruments acknowledging the receipt of the consideration for any such interest so dealt with; (*d*) leases of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent; (*e*) authorities to adopt which are

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document will take effect against an unregistered one,[1] and documents of which the registration is compulsory will not, unless registered, be received in evidence or become operative in any way.[2]

It follows, therefore, that in applying the rules now to be discussed, the document must, where so required by law, be a registered one, otherwise there can be no estoppel; and documents not required to be registered can only give rise to an estoppel in the absence of any registered instrument relating to the same matter.

Classification.

The topics which require to be discussed in connection with the subject may be presented as follows :—

1. Instruments are generally to be construed upon the assumption that they are no more than evidence against the parties, but the degree of formality of the document is to be regarded.

2. Estoppels must be made out clearly so that those who rely upon a document must clearly establish that it amounts to what they assert.

3. The consideration for a deed is essentially a matter of proof.

4. The effect to be attached to recitals in a formal document depends upon the contract between the parties.

5. As between the parties to a fraud against third persons it appears doubtful whether one of them can shew the truth where the illegal object has actually been effected.

6. Certain other subjects connected with matter in writing will be shortly considered.

Estoppel by Representation arising out of the contract.

The true rule as to estoppel by matter in writing appears to be that a party should be precluded from contradicting an instrument to the prejudice of another, where that other has been induced to alter his position upon the faith of the instrument. The Court will, except in the case, above mentioned, of fraud (as to which there appears to be some doubt), look to the essence of the transaction, the

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by that Act required to be registered. See *Mantena Rayaparaj* v. *Chekuri*, 1 Mad. H. C. R., 100 [1862], as to the requirements of Hindu Law. The Statute of Frauds (29 Car. II, c. 3), ss. 1, 2, 3, 4 and 17, which applied to certain contracts in the Presidency Towns, was repealed by Act IX of 1872, which, however, does not affect any Statute, Act or Regulation not expressly repealed by it, or any usage or custom of trade, or any incident of contract not inconsistent with the provisions of the Act (as, for instance, seamen's contracts, or contracts with railways or common carriers).

[1] Act III of 1877, s. 50, provides that certain documents relating to immoveable property of value less than Rs. 100, which may be registered, shall, if registered, take effect against unregistered documents relating to the same property.

[2] Act III of 1877, s. 49.

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contract between the parties being the ground of the decision, and the chief factor for determining what agreements will be enforced being the presence or absence of consideration. In this view estoppel by matter in writing is estoppel by *contract*, the estoppel arising out of the acts of one party inducing a change of position on the part of the other.[1]

(1) Deeds generally to be construed as only evidence against the parties.

The first and the most important rule by which deeds are to be interpreted, is one hostile to technicalities of every description.[2] Estoppel by Deed in its technical sense cannot now be said to exist. Prior to the Contract Act the Statute of Frauds was in operation in the Presidency Towns, and the technical doctrine appears to have been recognised to some extent.[3] All formalities as to the use of particular words are now abolished, but the transfer of certain kinds of property, and certain contracts, are required to be in writing and registered ; and where the terms of a contract, grant or disposition of property have been reduced to writing the document speaks for itself.[4] The rule against technicalities has been observed upon by the Courts in various

The Courts are hostile to technicalities.

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[1] It is of course a cardinal rule of evidence that where written documents exist they shall be produced as being the best evidence of their own contents. See *Dinomoyi Debi* v. *Luchmiput Singh*, L. R., 7 I. A., 8 [1879]. Evidence Act (I of 1872), s. 92.

[2] "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses" *Per* Knight-Bruce, L. J., in *Hunooman Prosad Pandey* v. *Musst. Babooee*, 6 Moo. I. A., 411 [1856], and *see* the remarks of Wilson, J., in *Ramlal Sett* v. *Kanai Lal Sett*, I. L. R., 12 Calc., at p. 578 [1886].

[3] See *Rajunder Narain Rai* v. *Bijoi Govind Singh*, 2 Moo. I. A., 181 [1839] ; deed of compromise solemnly acknowledged in court ;—*Blaquiere* v. *Ramdhone Doss*, Bourke, 319 [1865], where Phear, J., held that an endorsement upon a conveyance amounted "in some sort to a covenant for quiet enjoyment or at any rate to an estoppel." This appears to be a case of Estoppel by Deed, but the facts are imperfectly reported. *See* also *Choonee Lal* v. *Shaikh Keramut Ali*, W. R., 1864, 283, where Trevor and Campbell, JJ., observe :— "There can be no doubt that there are certain fraudulent acts which, when perfected, even though done with the intention of deceiving third parties, cannot be gainsaid by the parties as between themselves. Of such a nature is the transfer of land perfected by *deed* and possession. In such a case, if the nominal transferee afterwards, relying on the *deed* in his name, and possession in his favour, turn round upon the party transferring the property nominally, and claim it as his own, the transferee is bound by the fraudulent acts to which he was a party. But the present case is not of that high nature." The fact, however, of possession being given removes the case in some degree out of the technical doctrine. See *Khem Karan* v. *Har Dayal*, I. L. R., 4 All., 37 [1881], where the purchasers pleaded their minority to defeat a right of pre-emption, and it was held that, as the conveyance was perfected and they were in possession of the property, they were estopped from raising this defence.

[4] Act I of 1872, ss. 91—97.

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cases, and certain observations of learned Judges may be cited as shewing the manner in which the doctrine of estoppel has applied to written matter has been regarded. It is to be apprehended, however, that the degree of formality of the document will generally be considered by the Court.[1]

Chowdry Deby Persad v. Chowdry Dowlut Sing.

In a case decided in the year 1844,[2] their Lordships of the Privy Council, referring to the practice of the native Courts in India, treat it as well settled that a statement of consideration in a rufanama, or deed of compromise, is "not conclusive evidence as the statement of such a fact in a deed under seal would be in a Court of Law in England; but it is evidence as far as it goes."[3]

Zamindar Strimatu Gaurevallaha v. Virappa Chetti.

In a case elsewhere discussed,[4] the Madras High Court in the year 1864 observed:—"The strict technical doctrine of the English Law as to estoppels in the case of solemn deeds under seal rests upon peculiar grounds that have no application to the present bonds, or the other written instruments ordinarily in use amongst natives."

Ram Sarun Singh v. Musst. Pran Peary.

In the year 1870, their Lordships of the Privy Council, in a suit by a mortgagee for foreclosure founded upon an alleged mortgage transaction, allowed the defendant, a widow, to prove that the deed had been concocted by her and her brother to defeat the claim of her husband's heirs, and observed:—"It is open to a mortgagor in this country to deny that the money, the receipt of which is formally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing ... it appears to their Lordships that there is nothing whatever to prevent the defendant from showing the real truth of the transaction."[5]

Donzelle v. Kedarnath Chuckerbutty.

The same principle is asserted in a case in the Calcutta High Court in the year 1871, where Paul, J., observed:—"In England

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[1] Act I of 1872, s. 92, prov. (2).

[2] *Chowdry Deby Persad* v. *Chowdry Dowlut Sing*, 3 M. I. A., at p. 354.

[3] *See* the rule as to consideration examined, *infra*, p. 216 *et seq.*

[4] 2 Mad. H. C., 174 (175). In *Tirumala* v. *Pingala*. 1 Mad. H. C. R., 312 (318) 1863]. Holloway, J., observed:—"I am also clearly of opinion that in treating this document, even if executed, as possessing all the mysterious properties attaching to a deed, there has been further a more serious error. Happily for the administration of justice, we know nothing of specialties, and in the country of their origin this would not be one. The indispensable sealing has not been gone through. It is at the utmost a document not under seal evidencing an account stated."

[5] 13 M. I. A., 551 (559).

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where the usage denoted by benami transactions is wholly unknown, it is supposed, and therefore assumed, that all deeds and conveyances truly represent the titles of parties set forth in them. Deeds are called solemn instruments; they are executed after considerable deliberation, and under the guidance and advice of able legal advisers. In England and, in fact, wherever the English law prevails and English institutions exist, it is right to suppose that what is stated in deeds and other similar documents represent the true state of things, and, consequently, parties should not be allowed afterwards to question the truth of what has been deliberately stated. But in this country, it being well known that documents are neither so drawn nor executed as in England, and it being equally well known that persons make statements wholly regardless of the truth for present and ulterior purposes, it would be unsafe and unjust to hold parties strictly to statements made by them in deeds and other documents, and to apply the technical doctrine of estoppel in the manner in which that doctrine is applied in cases governed by English law . . . The application of a technical doctrine which must, I believe, lead to inevitable fraud and clear injustice, should neither be enforced nor adopted by Courts which are directed to decide cases by the principles of justice, equity, and good conscience."[1]

Param Singh Lalji Mal.

The Allahabad High Court in 1877 lay down the same rule :— "If a party to a deed is to be precluded from questioning his solemn act, much injustice would be wrought in this country. The strictness of the rule of estoppel has been in England relaxed. If it is to be used to promote justice, the degree of strictness with which it is to be enforced, must be proportioned to the degree of care and intelligence, which the natives of the country, in practice, bring to bear upon their transactions. What is ordinarily known

[1] 7 B. L. R., 728—730. The case was remanded and afterwards came before Phear and Morris, JJ., on special appeal where these remarks were approved. *See* 20 W. R., 353 [1873]; also *Ram Gopal Law* v. *Richard Blaquière*, 1 B. L. R. (O. C.), 37 [1867], where Norman, J., said : "In the case of a contract, where a Hindu or Mahomedan is defendant, the Court recognises no distinction [between specialty and simple contract debts]; but if the defendant is a Eurasian, I think it will recognise a distinction. If Blaquière had died before the passing of the Indian Succession Act, I have no doubt that, in the administration of his estate of the creditors, those secured by deed would have been paid first. It may be that the position of such creditors is altered by the Succession Act, but that was the law of the Court."

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in these provinces as a deed, is an attested agreement prepared without any competent legal advice, and executed and delivered by parties who are unaware of any distinction between deeds and agreements. Under these circumstances it appears to us that justice, equity, and good conscience require no more than that a party to such an instrument, should be precluded from contradicting it, to the prejudice of another person, when that other, or the person through whom the other person claims, *has been induced to alter his position* on the faith of the instrument; but where the question arises between parties or the representatives in interest of parties, who, at the time of the execution of the instrument, were aware of its intention and object, and who have not been induced to alter their position by its execution, we consider that justice in this country will be more surely obtained, by allowing any party, whether he be plaintiff or defendant, to shew the truth." [1]

(2) Estoppels must be made out clearly.

Another cardinal rule as to the interpretation of written matter alleged to raise an estoppel is that the estoppel must be made out clearly [2] and that, consistently with the rule which prevents the terms of a document being added to or varied or altered by oral evidence,[3] the construction of a document may be aided by looking to the surrounding circumstances. These principles are recognised by Privy Council in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*,[4] where the defendant, in answer to the plaintiff's claim, set up an agreement by way of compromise contained in two deeds, the second of which recited that the whole property had been divided among the parties according to their specific shares (which had been declared by the first agreement), and that all the disputes had been amicably adjusted. There was no evidence, however, that any partition by metes and bounds had been made of the property in dispute. As to the second, and more material, document their Lordships said :—"This document is in ambiguous language, and some care is required in considering what is the effect of the language in it. It may here be said that

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[1] I. L. R., 1 All., 410, dissented from in *Chenvirappa* v. *Puttappa*, I. L. R., 11 Bom., 708 [1887].

[2] *See* Introduction, p. 4 *supra*.

[3] *See* Act I of 1872, ss. 91—97.

[4] 13 B. L. R., 312 [1874]. The same rule was laid down by Sir Barnes Peacock, in *Tweedie* v. *Poorno Chunder Gangooly*, 8 W. R., 125 [1867].

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those who rely upon the document as an estoppel—the nature of an estoppel being to exclude an inquiry by evidence into the truth—*must clearly establish that it does amount to that which they assert*." Their Lordships then found that there were words which, taken by themselves, would comprehend the whole of the property mentioned in the first agreement, but that these words were by the governing clause limited to the property held by the Court of Wards; and proceeded—"It will be observed from what has been already said that their Lordships have felt this document is ambiguous, and this being so, the construction of it may be aided by looking at the surrounding circumstances. If it had appeared that the appellant had had possession for a long number of years of some property which had belonged to Raja Rattan Singh in Oudh, and the respondent and those she represents had been in possession of other property which had belonged to the Raja, it might have been inferred that a partition had been made by agreement, and that the parties were content to hold what they had so agreed to take without any formal partition by a *punchayat*." This presumption, however, did not appear to be supported by any evidence of other property in Oudh being in the ownership or possession of the appellant by any acquiescence on her part from which a partition could safely be presumed. The rights, therefore, of the appellant were those declared by the first agreement, which was shewn to have never been carried into effect.

Estoppel manifest upon the face of deed.

But where the estoppel is manifest upon the face of a deed and another party has relied upon it, the doctrine operates in his favour. In *Seva Ram* v. *Ali Bakhsh*,[1] one Moti Ram, the mortgagee of certain property, mortgaged a portion to the plaintiff, representing himself to be the full owner, there being a clear and definite recital to that effect in the deed. Subsequently Moti Ram actually became the owner by purchase, and a decree being obtained against him, the defendant, Ali Bakhsh, purchased the property at the auction-sale. In a suit by the plaintiff to enforce the hypothecation of the mortgaged estate against Moti Ram and Ali Bakhsh, the latter being shewn to have been fully aware of the state of the title, the Court held that the plaintiff must succeed. He could have enforced the hypothecation against Moti Ram at any time before

[1] I. L. R., 3 All., 805 [1881].

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the purchase of Ali Bakhsh after Moti Ram had acquired the full proprietary interest, as the latter would have been estopped from denying the terms of his deed, and Ali Baksh, who claimed through Moti Ram with notice of the recital, was in no better position.[1]

No estoppel upon invalid document.

It follows from the rule now under discussion that no estoppel can be raised upon an invalid document. Thus where plaintiff and defendant both claimed through a document which the Court found to be a deed of gift and invalid according to Mahomedan Law, it was held that the document could not operate as a will, and that there was no estoppel upon the defendant. As between the parties the document could not be taken as valid.[2]

(3) The consideration for a deed is essentially matter of proof.

The consideration for parol and written contracts, in this country, is essentially a matter of proof, and a statement that the consideration has been paid in full is only strong presumptive evidence which may be rebutted, consistently with the rule that extrinsic evidence is not receivable to contradict or alter the terms of a written contract.[3]

Receipt.

A receipt is a document, the terms of which cannot be mistaken and which is well within the intelligence of ordinary persons.[4] But where payment is denied and evidence of non-payment is produced, the burthen of proof that the money was paid is on the debtor.[5] "We think," said their Lordships of the Privy Council,

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[1] The above case also illustrates the doctrine of title by estoppel elswhere discussed. The full ownership acquired by Moti Ram by purchase enured for the benefit of his mortgagee, Moti Ram having represented to him that he was hypothecating not merely his mortgage right, but the entire zemindari and malguzari estate. This aspect of the case is not, however, expressly noticed in the report of the judgment.

[2] *Kuvarbai* v. *Mir Alam Khan*, I. L. R., 7 Bom., 170 [1883].

[3] *Zamindar Strimatu Gaurevallaba* v. *Virappa Chetti*, 2 Mad. H. C., 174 [1864]; *see* Act I of 1872, s. 92, prov. (1).

[4] See *Hunter* v. *Walters*, L. R., 7 Ch. Ap. 75 (82) [1871]. In *Bickerton* v. *Walker*, L. R., 31 Ch. D., 151 (159) [1885], Fry, L. J., observed: "The presence of a receipt indorsed upon a deed for the full amount of the consideration money has always been considered a highly important circumstance. The importance attached to this circumstance seems at first sight a little remarkable when it is remembered that the deed almost always contains a receipt, and often a release, under the hand and seal of the parties entitled to the money. But there are circumstances which seem to justify the view which has prevailed as to its importance. A deed may be delivered as an escrow, but there is no reason for giving a receipt until the money is actually received, unless it be to enable the person taking the receipt to produce faith by it. A deed is not always, perhaps rarely, understood by the parties to it, but a receipt is an instrument level with the ordinary intelligence of men and women who transact business in this country, and which he who runs may read and understand."

[5] *Chowdry Deby Persad* v. *Chowdry Doulut Sing*, 3 M. I. A., 346 [1844].

referring to the statement, in a deed of compromise, that the consideration money had been paid, "that . . . the statement of such a fact in a deed of this description is *primâ facie* evidence, that the money therein stated to be paid, was paid at the time of execution of the deed . . . But that evidence is completely rebutted."[1] And it was conceded and taken as the foundation of the decision that the admission of payment in the deed was not conclusive.

Primâ facie evidence which may be rebutted.

The rule that consideration is a matter of proof was recognised in all the Presidencies from early times.

Rule acted upon in India.

The Madras High Court, in a suit[2] to recover money lent to the defendant upon bonds executed by him which contained a statement that the principal had been borrowed and received in cash, allowed him to prove that he had received only a portion, overruling certain decisions of the late Sudder Court of that Presidency. "There is no doubt," said their Lordships, "that the statements in the bonds are strong *primâ facie* evidence of the truth of the actual receipt of the money, and to be rebutted only by clear and satisfactory proof to the contrary on the part of the defendant, upon whom lies the onus of proof. But they cannot on any sound principle of the law of evidence be treated, between these parties, as conclusive evidence."

Stipulation in bond.

Madras.

In the following year the Calcutta High Court, referring to previous decisions of the Sudder Court, held that the mere absence of an endorsement of payment on the back of a *kistbundee* could not prevail against positive proof of payment, and evidence should therefore have been allowed.[3] Similarly, it was ruled that a stipulation in a bond that all payments should be endorsed on the back thereof, and that all other pleas of repayment should be futile, is no estoppel, and the obligor may prove by other means that the debt or a part of it has been satisfied.[4] In a like case [5] the Madras High Court observed: "In deciding whether the alleged payments were made, of course the omission of endorsements is a most important circumstance to be considered." And the High Court of the North-West Provinces held to the same effect.[6]

Calcutta.

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[1] *Chowdry Deby Persad* v. *Chowdry Dowlut Sing*, 3 M. I. A., 354.

[2] *Zemindar Strimatu Gaurevallaba* v. *Virappa Chetti*, 2 Mad. H. C., 174 [1864].

[3] *Girdharee Singh* v. *Lalloo Koonwur*, 3 W. R. (Misc.), 23 [1865].

[4] *Kalee Doss Mittra* v. *Tara Chand Roy*, 8 W. R., 316 [1867].

[5] *A. Sashachellum Chetty* v. *T. Govindappa*, 5 Mad. H. C., 451 [1870].

[6] *Nugar Mall* v. *Azeemoollah*, 1 N.-W.P. H. C. R., 146 [1869].

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Bombay.

In a suit [1] upon a bond executed by the defendant upon an adjustment of the accounts of his dealings with the plaintiff, it appeared that the defendant had admitted upon the bond that a certain balance was due, but afterwards set up that the balauce had been incorrectly stated owing to errors in the adjustment. The bond contained a stipulation that no payment was to be recognised except "after causing the payment to be entered on the back of the bond or after taking a receipt for the same." The defendant alleged that he had made various payments in respect of the balance which were not indorsed on the bond and for which he held no receipt. The Bombay High Court referred to the previous decisions and observed :—"We do not think that the defendant ought to be permitted to reopen the question of the correctness of the balance. The defendant says that he objected to it at that time ; . . assuming that to be true, the defendant must be regarded as having waived his objection, for, notwithstanding it, he subsequently executed the bond and made payments upon it. It would be different if his allegation were that, after the execution of the bond, he discovered the errors in the account on which the balance was arrived at." And, upon the stipulation, the Court observed :—"It is against good conscience that an obligee should stipulate that, although he may have been paid in part or in full, he should, if the evidence of such payment were not in writing, be at liberty to treat the payment as a nullity. He would, in enforcing such a condition, be availing himself of his own negligence or wrong. Such a condition, we think, could only be imposed by the Legislature, which has in certain cases imposed somewhat analogous conditions, as for instance in section 206 of the Civil Procedure Code."[2] The learned Chief Justice then referred to the antiquity of the practice among Hindus of indorsing payments on bonds and giving receipts in writing, and cited texts,[3] showing that the omission of a creditor who accepted a payment but refused to grant a receipt, might operate as a forfeiture of the balance of the debt ; and concluded :—"It is, however, with the Anglo-Indian law of evidence we have to deal. It does not exclude oral evidence of payment, and we

Antiquity of the practice.

[1] *Narayan Undir Patil*, v. *Motilal Ramdas*, I. L. R., 1 Bom., 45 [1875], Westropp, C. J., and Kemball, J.

[2] Act VIII of 1859, s. 206 ; *see* Act XIV of 1882, s. 257, as to money payable under a decree.

[3] Colebrooke's Digest, Bk. 1, pl. 287, 828.

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should deem it to be both against good conscience and the policy of the law to reject it."

Rule in England. Acknowledgment of receipt as between the parties.

So, in England, an acknowledgment of receipt of money or goods, not actually amounting to a contract between the parties, is evidence between them, but is generally capable of being explained. In *Farrar* v. *Hutchinsion*[1] the plaintiffs sued as partners on a bill of exchange, and the defendant produced a receipt given by one of them. The plaintiffs proved that the receipt was given for the purposes of the cause, and was not *bonâ fide*. Lord Denman observed :—"It appears to us that in all cases a receipt signed by a party, like any other statement made by him and produced afterwards to affect him, is evidence, but evidence only, and capable of being explained;" and the receipt, though signed by one of the members of a firm, was held to be a fraud upon the others. So where two co-trustees sued to recover a sum of money and the defendant produced a receipt signed by one of them, evidence was admitted to shew that the giving of the receipt was a fraudulent transaction and that the defendant had not paid the money. Abbott, C. J., remarked :—"The receipt was not a discharge of the action nor was it pleadable in bar; but a release is, and although fraudulent, a Court of law can only avoid it by equitable interference. A receipt is very different, and is nothing more than a *primâ facie* acknowledgment that the money has been paid."[2] In *Graves* v. *Key*[3] a receipt on a bill of exchange was allowed to be explained by shewing that the money had been paid in order to acquire an interest in the bill by purchase, and the negotiable quality of the instrument was not therefore destroyed, Lord Tenterden holding that a receipt is an admission which may be contradicted or explained, and is not conclusive evidence except in favour of any person who may have been induced thereby to alter his condition.[4]

Partners.

Co-trustees.

Release.

Bill of exchange.

Bowes v. *Foster*[5] is a typical case of this kind. There a fictitious invoice of the goods in the plaintiff's shop was made out, and a receipt given to the defendant for the sum therein stated to be the purchase-money. The defendant took possession of the goods, and

Fictitious invoice. Bowes *v.* Foster [1858].

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[1] 9 Ad. & El., 641 [1839].
[2] *Skaife* v. *Jackson*, 3 B. & C., 421 [1824].
[3] 3 B. & Ad., 313 [1832].
[4] *See* the judgment in 318 (*n*).
[5] 2 H. & N., 779; 27 L. J. (Exch.), 262 [1858].

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afterwards sold the goods as his own. The plaintiff, in an action for trover, was allowed to shew that the transaction was a fictitious one, entered into in order to create a colourable title in the defendant to prevent the goods being taken in execution. "A release," said Martin, B., "annihilates the debt, but a receipt is only evidence of payment; and if it be proved that in point of fact no payment was made, it cannot operate against such proof."

Estoppel where another party has altered his condition.

But where a person has been induced to alter his condition, the rule expressed by Lord Tenterden in *Graves* v. *Key*[1] applies. Where a person hands to another a document which on the face of it professes to be a transfer of property or a receipt for money, and that other is induced to change his position, it would be a fraud upon him to allow the former to shew the real truth.

Rice v. Rice [1854]. Unpaid vendor parting with deed reciting that purchase-money has been paid.

This rule was laid down with great clearness by Kindersley, V. C., in *Rice* v. *Rice*.[2] In that case the vendors conveyed property without receiving the purchase-money in full, but the assignment recited the payment of the whole purchase-money, and the usual receipt was indorsed on it, and the vendors allowed the title-deeds to be delivered to the purchaser. The day following the execution of the deed, the purchaser deposited the assignment and title-deeds with a memorandum of deposit to secure an advance, and absconded without paying either the vendors or the equitable mortgagees. The property not being of sufficient value to satisfy both the vendors and the equitable mortgagees, the question of priority arose as to which of these two equitable interests should prevail. The Court applied the principle of estoppel by conduct.

Unpaid vendor's lien defeated.

In *Shropshire Union Railways and Canal Co.* v. *The Queen*,[3] the case last cited was approved by the House of Lords. Lord Cairns, L. C., referring to *Rice* v. *Rice*, observed:—"There a vendor, who unquestionably would have been held to have, in the eye of a Court of Equity, a lien for his purchase-money, for some purpose indorsed upon the deed a receipt for that purchase-money stating that it had been paid. That was just the same thing as if he had stated that he had not a lien, or that he did not wish to insist upon a lien for the purchase-money, and it would have been contrary to the first principles of equity, and indeed of common

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[1] 3 B. & Ad., 318 (*n*) [1832].
[2] 2 Drewry, 73 [1854].
[3] L. R., 7 E. & I., Ap., 496 (510) [1875].

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sense, to say that, after that deed had been given by him to the purchaser, and the purchaser armed with that deed had created an interest in some third party on the faith of that statement, the vendor could subsequently come forward, and, as against that third party, claim to be put in possession of that lien which by the indorsement of that receipt he had virtually surrendered."

Mortgagor acknowledging receipt of mortgage money estopped as against assignee of mortgage who has given full value.

In *Bickerton* v. *Walker*[1] the plaintiffs had mortgaged their interests in certain stock and policies of insurance to one Bates for £250, but only received £91. By the mortgage-deed they acknowledged the receipt of the entire amount, and they also signed a receipt to that effect indorsed upon the mortgage-deed. Bates transferred the mortgage to one Hunter, who gave full value for the mortgage as a mortgage for £250, without making any inquiry from the mortgagors. The Court held that the plaintiffs would have been entitled as against Bates to redeem upon payment of the sum they actually received with interest, but that as against Hunter the mortgage must be taken to be a mortgage for £250.

Pledgor of title deeds estopped.

Where an owner of deeds has placed them under the control of another, and has authorised him to pledge them for a certain sum, and the latter has pledged them for a larger sum with a person who has dealt *bonâ fide* with him and without notice of the limits of his authority, the owner of the deeds cannot redeem them without repaying the full amount advanced.[2]

(4) The effect to be attached to recitals.

The weight to be attached to a recital differs according to the circumstances. In some cases it is conclusive and in others very far from so, but it is in all cases evidence as between the parties who make it, being a statement deliberately made by those parties. It is no more evidence as against third person than any other statement would be.[3]

The contract and situation of the parties are to be looked to.

The rule as to the effect of a recital is thus laid down by Erle, J., in *Stroughill* v. *Buck*[4] :—"I have no doubt that a recital by

[1] L. R., 31 Ch. D., 151 [1885]. *See* the remarks of Fry, L. J., at p. 158.

[2] See *Brocklesby* v. *Temperance, &c., Building Society*, L. R., '93, 3 Ch., 130, and cases there cited.

[3] *Brajeshware Peshakar* v. *Budhanuddi*, I. L. R., 6 Calc., 268 [1880]. As to recitals in deeds *see* further *Pellikelagatha Marear* v. *John Gothfried Sigg*, L. R., 7 I. A., 83 [1880]. "The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but, on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital" [p. 100].

[4] 14 A. & E. (Q. B.), 781 (784, 787) [1850].

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one party of a state of facts on the faith of which the other party was induced to enter into the contract is an estoppel in favour of the party who entered into the contract on the faith of them. But such recital does not estop in favour of third persons who did not contract on the faith of it." And Patteson, J., in delivering the judgment of the Court, formulates the rule more precisely :—

Does the recital express the bargain upon the faith of which the parties have acted ?

"When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. All the cases were brought forward and considered in *Young* v. *Raincock*,[1] and we have no doubt that the result of them is as above stated."

Mistake may be shewn.

It seems clear that a recital in a document, formal or informal, is binding if, in the words of Martin, B., in *South-Eastern Railway Co.* v. *Warton*,[2] "it is the bargain on the faith of which the parties have acted ;" but it is equally clear that evidence of the circumstances under which an admission by recital has been made is receivable to shew that the recital was introduced into the deed by a mistake of fact, and does not represent the real transaction.[3]

No estoppel as to matters collateral.

There is, however, no estoppel where the action is upon a matter not arising out of the deed, but wholly collateral to it. The rule as to this was stated by Parke, B., in *Carpenter* v. *Buller*[4] :—"If a distinct statement as to a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument and in an action upon it, it is not competent to the party bound to deny the recital .... But there is no authority to shew that a party to the instrument would be estopped in an action by the other party, not founded on the deed and wholly collateral to it, to dispute the fact so admitted, though the recitals would certainly be evidence."

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[1] 7 C. B., 310 [1849].

[2] 6 H. & N., 520 (527) [1861].

[3] See *Brooke* v. *Haynes*, L. R., 6 Eq., 25 [1868] ; *Empson's case*, L. R., 9 Eq., 597 1870].

[4] 8 M. & W., 209 (212) [1841]. See *Ex parte Morgan*, L. R., 2 Ch. D., 72 (89) [1876] ; *South-Eastern Railway Co.* v. *Warton*, 6 H. & N., 520 (528) [1861] ; *Carter* v. *Carter*, 3 K. & J., 617 (645) [1857].

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The rule that a general recital does not work an estoppel, but a recital of a particular fact does work an estoppel,[1] would seem to be another way of stating the principle that estoppels must be precise and certain. In all cases, it is apprehended, what is to be looked to is the contract which the parties have made.

Cases where recitals held not conclusive.

In a suit to enforce a mortgage-bond[2] the defendant pleaded that he had purchased the property *bonâ fide* from the mortgagor, and that the mortgage was a fraudulent transaction. The bond contained a recital that consideration had been paid, and the execution and registration of the deed were proved. Garth, C. J., referring to the case of *Chowdhry Deby Persad* v. *Chowdhry Dowlut Singh*,[3] said that, "in a case of this kind the weight to be attributed to the recital would depend entirely upon the other evidence of the *bonâ fides* of the bond. Against the defendant, who claimed under the mortgagor, the recital would be evidence, but if the transaction itself were not honest the recital would have little weight.

A recital in a deed of the necessity for contracting a debt binding on a member of a joint family is some evidence of the necessity, but is by no means conclusive. Its absence will, however, make it difficult for the person affirming that there was necessity to succeed.[4] Similarly, a recital that money has been borrowed by a Hindu widow for her husband's *shradh* is by itself no evidence to charge the estate.[5]

Primâ facie evidence.

A recital, though it may not amount to an estoppel, may have force *primâ facie* as an admission by conduct. The point is illustrated in *Sarkies* v. *Prosonomoyee Dassee*,[6] a decision which involved other questions. That was a suit for dower by an Armenian widow against Hindu purchasers. The deed of conveyance recited

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[1] Sm. L. Ca., Vol. II, 9th ed., 906, 907.

[2] *Brajeshware Peshakar* v. *Budhanuddi*, I. L. R., 6 Calc., 268 [1880].

[3] 3 M. I. A., 347 [1844].

[4] *Sikher Chand* v. *Dulputty Singh*, I. L. R., 5 Calc., 363 (375) [1879].

[5] See *Sunker Lall* v. *Juddoobuns Suhaye*, 9 W. R., 285 [1868]. For other cases where recitals have not been held to be conclusive, see *Mahomed Hamidoolah* v. *Modhoo Soodun Ghose*, 11 W. R., 298 [1869], as to possession; *Rao Kurun Singh* v. *Mehtab Koonwer*, 3 Agra, 150 [1868], as to previous mortgage; *Gopal* v. *Narayan*, 1 Bom. H. C., 31 [1863], as to separation between members of a family; *Bheeknarain Singh* v. *Necot Koer*, Marsh., 373 [1863], as to recital in lease of fact of *mooktearnamah*; *Bomanjee Muncherjee* v. *Hossain Abdoollah*, 5 W. R. (P. C.), 61; 1 M. I. A., 494 [1866]; *Nilmonee Chowdhry* v. *Zuheerunissa Khanum*, 8 W. R., 371 [1867]; *Lakshman Dada Naik* v. *Ram Chandra Dada Naik*, I. L. R., 1 Bom., 561 [1877], as to recitals in wills.

[6] I. L. R., 6 Calc., 794 [1881].

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that the plaintiff's husband was entitled to an estate of inheritance in fee-simple. On appeal the defendants contended that there was no sufficient evidence that the husband's estate was an estate in fee-simple. Upon this point the Court observed that, although as between the plaintiff, who was no party to the deed, and the defendants, there was no estoppel, yet as the purchasers bought the property as and for an estate of inheritance, and paid for it as such, it was clearly *primâ facie* evidence against the defendants claiming under the purchasers that the estate was what it purported to be.

May be explained.

A recital may be explained by looking to the surrounding circumstances. In *Gour Monee Debea* v. *Krishna Chunder Sannyal*,[1] the plaintiff claimed under a *kobala* which contained a recital that one Haradhun, the former owner of the property, had died childless or without male issue. The defendant contended that upon the recital it must be taken that her own title as daughter of Haradhun would arise immediately upon his death, and that neither the plaintiff's vendor nor her deceased husband could have taken the property. The plaintiff was allowed to shew that Haradhun left a son who died childless, and that upon his death the property descended to one Bissumbhar, and after his death to his widow, the plaintiff's vendor.[2]

(5) Can one of the parties to a fraud against third persons shew the truth as against the other when the illegal object has been effected?

The position *inter se* of parties to a fraud against third persons has been noticed in the Chapter upon Benami Transactions.[3] The question arises in connection with the present subject when one person has conveyed his property to another for the purpose of effecting a fraud and such fraud has been effected. In such a case it appears doubtful whether either of the parties to the fraud can be allowed to shew the truth and avoid the effect of the deed as against the other party. Upon this point there is a conflict of opinion in the Indian Courts. The argument in favour of the estoppel is put very clearly in the judgment of West, J., in *Chen-*

[1] I. L. R., 4 Calc., 397 [1878]. See *Nunhoo Sahoo* v. *Boodhoo Jummadar*, 13 W. R., 2 [1870].

[2] The Court observed: "It appears to us that this is not such an admission as conclusively binds the plaintiff. It was not essential to state in this *kobala* by what means the property which was being sold had come to the husband of the vendor. It was enough for her to recite that her husband being dead, she was his heir and representative, and that, for the reasons stated, she thought fit to sell the property... It is a circumstance which the Court below would be quite right in taking into consideration, but which it would be wrong in holding binding as against the plaintiff" [p. 401]. The defendant's right (if any) was, however, barred by limitation.

[3] Part I, Chapter II.

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virappa v. *Puttappa*,[1] where the authorities are exhaustively discussed.

Rule in England.

The rule in England has been stated thus :—"A party to a contract which is fraudulent against third persons cannot excuse himself from the performance of his part of the agreement by alleging that it was fraudulent and void," upon the principle that a man cannot set up his own fraud to avoid his own deed. But "where the purpose for which an assignment is made is not carried into execution and nothing is done under it, the mere intention to effect an illegal object when the assignment is executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it."[2]

No estoppel where a mere intention to effect an illegal object.

Rule in Calcutta not uniform.

The rule has not always been uniform in Calcutta. In *Kaleenath Kur* v. *Doyal Kristo Deb*[3] the plaintiff sued to recover property transferred by his father in fraud of creditors. The Court held, referring to numerous authorities,[4] that the plaintiff could not be allowed to allege and plead the fraud of another person through whom he derived his title, Hobhouse, J., observing : "On the whole I think that there are circumstances specially applicable to this country which incline me to think that those judgments are as politic as I am inclined to think that they are good in law. I believe that it is good that parties in this country should understand that in making arrangements in regard to their property for fraudulent purposes, such as defrauding creditors, they are entering on a dangerous course, and that they must not expect the assistance of the Courts to extricate them from the difficulties in which their own improbity has placed them."

The learned Judges, however, arrived at this decision with hesitation, and Bayley, J., referred to a passage in Taylor on Evidence,[5] where it is stated that the cases of *Montefiori* v.

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[1] I. L. R., 11 Bom., 708 (713—719) [1887].

[2] May on Fraudulent and Voluntary Dispositions of Property, 470—472.

[3] 13 W. R., 87 [1870].

[4] *Obhoy Churn Ghuttuck* v. *Treelochun Chatterjee*, S. D. R. [1859], 1639; *Ghurreeb Hossein* v. *Musst. Useemoonissa*, Hay [1862], 528; *Hurry Sunker Mookerjee* v. *Kali Coomar Mookerjee*, W.R. [1864], 265; *Luckhee Narain Chuckerbutty* v. *Taramonee Dossee* 3 W. R., 92 [1865]; *Fureedoonissa* v. *Ruhomut*, 4 W. R., 37 [1865]; *Aloksoondry Goopto* v. *Horo Lal Roy*, 6 W. R., 287 [1866]. See *Kanhya Lal* v. *Mohadeo Singh*, 6 W.R., 293 [1866].

[5] *See* 8th ed., 115, 116. "It seems now clearly settled that a party is not estopped by his deed from avoiding it by proving that it was executed for a fraudulent, illegal, or immoral purpose." See p. 70 (*n*), 4, *supra*.

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Montefiori[1] and *Doe* v. *Roberts*,[2] upon which the decision in *Obhoy Churn Ghuttuck's case* was based, are no longer law, and where the contrary rule is laid down.

Sreemutty Debia Chowdhrain *v.* Bimola Soonduree [1874].

In *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*,[3] *Kaleenath Kur's case* is stated to be contrary to other decisions in which it has been held that parties are not precluded from shewing the real nature of the transaction, although it might have been entered into for the purpose of setting up against creditors an apparent ownership different from the real ownership.

Rule in Allahabad.

Param Singh *v.* Lalji Mal [1877].

The question arose at Allahabad in *Param Singh* v. *Lalji Mal*[4] where the parties in 1853 had entered into a deed of conditional sale to protect the plaintiff's property in consequence of disagreements which had arisen between the plaintiff and his son, and the defendant had executed an agreement by which he undertook not to disturb the plaintiff's possession. Subsequently a third party obtained a decree against the plaintiff and attached the property, when the defendant intervened and made good his claim on the strength of a decree for foreclosure which he had obtained against the plaintiff *ex parte*. The defendant applied for execution of his decree against the plaintiff, but did not seriously prosecute his claim until 1872 when he obtained possession. The plaintiff then sued to recover possession of the property, alleging that the de-

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[1] 1 W. Bl., 363 [1762].

[2] 2 B. & Ald., 367 [1819].

[3] 21 W. R., 422 [1874]. The subject is discussed at pp. 70—74, *supra*.

[4] I. L. R., 1 All., 403 [1877]. The Court observed :—"The doctrine that *in pari delictoxpotior est conditio possidentis*, or that the Court, finding a man embarrassed by deceit, to which he was himself a party, will not interfere to relieve him from the consequences, must not be accepted without qualification. The English Court of Exchequer in *Bowes* v. *Foster* [27 L. J. (Ex.) 62 ; 2 H. & N., 779 (1858)] allowed a plaintiff to recover from the defendant, goods which he had deposited with the defendant in order to defeat or hinder the claims of creditors who might sue out execution, although the plaintiff had, for the purpose of deceit, furnished the defendant with evidence of a sale by handing him a priced invoice for the goods, and a receipt for the price; the Court held, that, inasmuch as in fact no sale had taken place, the plaintiff was entitled to recover. In the case before the Court the respondent furnished the appellant with a deed of conditional sale which did not, by itself, operate to pass the property in the lands therein mentioned. The foreclosure made the sale absolute,—the decree awarded possession ; but had not the decree been executed, the property would have remained the property of the respondent ; the parties *ex hypothesi*, did not intend that the property should pass, but that by the deed, foreclosure, and decree a semblance of title should be created in the appellant. If this be so, the case before us does not appear distinguishable from *Bowes* v. *Foster* ; but if it be dirtinguishable, on the ground that by the deed, foreclosure, or decree, or by all of them, the property passed, then, it appears to us, the respondent is entitled to rely on the agreement," pp. 411, 412. *Per* Turner and Oldfield, JJ.

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fendant was a mere trustee, *ismfarzi* for him, and that it was never intended that the property should pass. The High Court held that no limitation could run until the defendant expressly disavowed the trust, and upon the question of estoppel cited the Privy Council case of *Ram Surun Singh* v. *Musst. Pran Peary*,[1] observing: "In this country where *ismfarzi* transactions are so common.....we should establish a dangerous precedent were we to rule that, under all circumstances, a party is bound by his deed, and concluded from shewing the truth."

Rule in Bombay.

The above decision has, however, been dissented from in Bombay. In *Chenvirappa* v. *Puttappa*[2] the plaintiff, with a view to protect from creditors a house which he had purchased, caused the conveyance to be executed in favour of the defendant, his near relation, and held the property for several years as the defendant's tenant. Subsequently the defendant by collusion with the plaintiff obtained an *ex parte* decree against him. The plaintiff sued to have it declared that the sale-deed and the *ex parte* decree were collusive transactions in fraud of the plaintiff's creditors, and that the defendant, his benamidar, was a trustee for him. The case was decided mainly upon the principle of res judicata,[3] but the Court considered it doubtful whether, assuming that the original relations of the parties had not become merged in the decree, such a trust arising out of a *turpis causa* could be enforced by the Courts, and expressed an opinion that the parties to a collusive transaction should be permitted to shew the truth only where such a transaction remains in an inchoate stage and not where a third person's rights have already been defeated.[4]

The case of a plaintiff and a defendant are, however, distinguished by Sargent, C.J., in the recent case of *Babaji* v. *Krishna*,[5] observing that "there was no authority of a Court of equity which questions the right of the *defendant* to plead such a defence whatever doubt there may be as to the *plaintiff's* right to avoid his own deed by setting up his own fraudulent act."

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[1] 13 M. I. A., 551 (559) [1870].

[2] I. L. R., 11 Bom., 708 [1887]. *See*, however, *Mahadaji Gopal* v. *Vithal Ballal*, I. L. R., 7 Bom., 78 [1881]; *Luckmidas Khimji* v. *Mulji Canji*, I. L. R., 5 Bom., 295 [1880]; *Babaji* v. *Krishna*, I. L. R., 18 Bom., 372 [1893].

[3] *See* this case further discussed, *infra*, Part II, Chapter III, in connection with decrees.

[4] See Indian Trusts Act (II of 1882), s. 84.

[5] I. L. R., 18 Bom., 372 (374) [1893].

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(6) Other topics.

Certain other subjects connected with matter in writing remain to be examined.

(a) Title by Estoppel.

The rule of title by estoppel, which has already been noticed in connection with the estoppel against the landlord,[1] has been codified in the Transfer of Property Act,[2] and the Specific Relief Act,[3] and may be stated in the following form :—Where a grantor by his intention to be gathered from the scope and object of the instrument appears to state that he has a certain specific interest, and the Court finds that the parties proceeded upon the assumption that such an interest was to pass, the after-acquired estate of the grantor 'enures' for the benefit of the grantee, and the grantor or his representatives will be estopped from denying that he or they were possessed of the interest which purported to have been conveyed when the deed was executed. The rule, it is conceived, may apply to any deed or writing, apart from the question of its formality and subject only to the requirements of registration, and in the case of moveable as well as immoveable property.

Principle applied to mortgages.

In *Deoli Chand* v. *Nirban Singh*,[4] A mortgaged a fourteen-annas share to B, who afterwards bought from A a two-annas share which he re-sold at a later date to A. The twelve-annas share in the mouzah belonging to A was sold in execution of a decree against A and was purchased by B. B then attempted to execute his mortgage-decree against the two-annas share which he had resold to A. The Court observed: "The contract of the judgment-debtor was to hold fourteen annas subject to a mortgage for the repayment of the debt due to the appellant. So long as he had only a twelve-annas share in his possession the mortgage security was of necessity reduced to that amount; but if at any time he became owner of fourteen annas, the creditor

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[1] *Supra*, Chapter III, pp. 104—106.

[2] Act IV of 1882, s. 43 : " Where a person erroneously represents that he is authorised to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interests which the transferor may acquire in such property, at any time during which the contract of transfer subsists. Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

[3] Act I of 1877, s. 18 : " Where a person contracts to sell or let certain property having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights (*a*) if the vendor or lessor has, subsequently to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest."

[4] I. L. R., 5 Calc., 253 [1879].

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had an equitable right to demand that that fourteen annas should be held subject to his mortgage. This principle has been distinctly recognised in the Specific Relief Act."

So it has been held that a mortgagor executing a mortgage at a time when he has no title to the property must make good the contract out of any interest he subsequently acquires,[1] and the same rule applies in the case of a sale.[2]

Similarly, where a mortgagor mortgaged property, representing that it was unincumbered, whereas in fact it was subject to an annuity, his heirs, who afterwards became entitled to the annuity, were held precluded from setting up the charge.[3]

(*b*) Presumptions. Attestation of deed how far evidence of assent.

The mere fact of a person attesting a deed is no evidence in itself that he consented to it or knew its contents,[4] but in the case of a transfer or conveyance of property by a Hindu widow in Bengal upon the ostensible ground of legal necessity, the fact that a reversioner has attested the deed may be an important circumstance to shew his assent, if there is evidence to shew that he was aware of its contents. In *Rajlakhi Debi* v. *Gakul Chandra Chowdhury*,[5] the rule is thus stated by the Judicial Committee :— "Their Lordships cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might no doubt be shewn by other evidence that when he became an attesting witness he fully understood what the transaction was, and that he was a concurrent party to it, but from the mere subscription of his name that inference does not necessarily arise." "It constantly happens," observed Garth, C. J., in the case first cited, "that persons subscribe deeds as witnesses without having the least notion what they contain ; and if people were to be held bound by an instrument which they so subscribe, it might be a dangerous thing to witness any other man's signature."[6]

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[1] *Pranjivan Govardhandas* v. *Baju*, I. L. R., 4 Bom., 34 [1879].

[2] *Sheo Prasad* v. *Udai Singh*, I. L. R., 2 All., 718 [1880].

[3] *Radhey Lal* v. *Mahesh Prasad*, I. L. R., 7 All., 864 [1885].

[4] *Ram Chunder Poddar* v. *Har Das Sen*, I. L. R., 9 Calc., 463 (468) [1882], observing upon the Privy Council case.

[5] 3 B. L. R. (P. C.), 57 (63) [1869].

[6] *Ib.*, 63. *See*, however, *Matadeen Roy* v. *Muzoodun Singh*, 10 W. R., 293 [1868], explained in *Ram Chunder Poddar* v. *Hari Das Sen*. In the earlier case two brothers were entitled to a property in equal shares : one of them conveyed the whole property away, and the other attested the deed. The Court inferred that the latter was a

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Destroying or refusing to receive a document.

In this connection may be mentioned the presumption against a person wilfully destroying a document that he was aware of its contents. In *Ardeshir Dhanjibhai* v. *The Collector of Surat*,[1] a curious case, the plaintiff relied upon a *sanad* and petitioned the Mamlatdar of the pergunnah to search for it. The lower Court found that the defendant had destroyed what purported to be a copy of the *sanad*. The High Court held that the rule *omnia praesumuntur contra spoliatorem*[2] applied, and that it was not competent to the defendant to say that the document was not such a one as could legally be admitted in evidence, and that, as the plaintiff had made out a *primâ facie* case he was entitled to succeed. In the same way a person, who refuses to receive a registered letter sent by post, cannot afterwards plead ignorance of its contents.[3]

ature of Pardanashin.

It is necessary to mention that in the case of *pardanashin* ladies the Court requires very clear evidence that documents executed by them have been properly explained to and understood by them, and the onus will be on those who rely upon such documents to satisfy the Court that the executant was fully aware of the nature of the transaction.[4] The ordinary presumption that a party who signs a deed knows what he is doing does not in this case apply.[5]

(c) Documents which may raise an estoppel.

Certain documents which may raise an estoppel require to be noticed.

Invoice.

An invoice in most cases does not represent the real contract, though it may be strong evidence between the parties. "If at the time of the sale an invoice is made out, or anything passes to shew that the parties meant the invoice to be the contract, it would be; but the mere fact of an invoice being afterwards made out will not make it the real contract, or clothe it with the incidents of

consenting party. As to what will amount to consent on the part of a reversioner and how far the concurrence of some of the members of a family may bind the rest, *see* Mayne's Hindu Law, §§ 592, 593.

[1] 3 Bom. H. C. (A. C.) 116 [1866].

[2] *Armory* v. *Delamirie*, 1 Sm. L. Ca., 9th ed., 385. "If," said Lord Holt [Anon., 1 Ld. Raym., 731], "a man destroys a thing that is designed to be evidence against himself a small matter will supply it."

[3] *Loolf Ali Meah* v. *Pearee Mohun Roy*, 16 W. R., 223 [1871]. As to service of notice to quit by registered letter see *Jogendro* v. *Dwarka Nath*, I. L. R., 15 Calc., 681 [1888].

[4] *Sudisht Lal* v. *Sheobharat Koer*, I. L. R., 7 Calc., 245; L. R., 8 I. A., 39 [1881]; *Delroos Banoo Begum* v. *Ashgar Ally Khan*, 15 B. L. R., 167; 23 W. R., 453 [1875]; *Ashgar Ally* v. *Delroos Banoo Begum*, I. L. R., 3 Calc., 324 [1877].

[5] *Ashgar Ally* v. *Delroos Banoo Begum*, I. L. R., 3 Calc., 324 [1877].

one.[1]" In *Holding* v. *Elliott*[2] parol evidence was held admissible to shew that the person whose name appeared upon the invoice was in fact not a contracting party, the contract having been made by parol previously, and Pollock, C. B., doubted whether in any case an invoice can with propriety be called an estoppel.

Documents representing goods.

But there are other documents which, when acted upon, may estop the person responsible for them from denying their effect. Of this nature are warehouse receipts, delivery orders, and other documents of that class. These documents represent goods as being in the custody of a person who holds them for and on account of another, and the receipt may amount to an admission by that person, that he is a kind of bailee for the other, or to an attornment by him to the other. Such documents have sometimes been described as *quasi* negotiable but, in fact, the issuing of these receipts can amount only to a representation (upon which a purchaser for value may be justified in acting) that the goods are lying in the warehouse to the order of the person who holds the receipt for the time being, for valuable consideration, and without notice of any defect in the title of the person from whom he obtained the receipt.

Warehouse receipts and delivery orders.

Illustrations of this class of case are to be found in the cases of *The Ganges Manufacturing Co.* v. *Sourujmull*,[3] *Knights* v. *Wiffen*,[4] *Coventry* v. *The Great Eastern Ry. Co.*,[5] and *Seton* v. *Lafone*,[6] the facts of which are fully set out in other chapters.

Mercantile meaning.

It would seem that in order to raise an estoppel by the delivery of, or assent to, a document representing goods, the document must have a mercantile meaning to the effect that the goods sold have been separated from other goods, and are held by the defendant for the benefit of the plaintiff.[7]

The case of *Farmeloe* v. *Bain*[8] shews that the issuing of a written undertaking may *not* amount to a representation to all the

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[1] *Per* Martin, B., in *Holding* v. *Elliott* 1860].

[2] 5 H. & N., 117.

[3] I. L. R., 5 Calc., 669 [1880].

[4] L. R., 5 Q. B., 660 [1870].

[5] L. R., 11 Q. B. D., 776 [1883].

[6] L. R., 19 Q. B. D., 68 [1887].

[7] *See* the observations of Brett, L. J., upon *Knights* v. *Wiffen*, in *Simm* v. *Anglo-American Telegraph Co.*, L. R., 5 Q. B. D., at p. 212. *See* also *Austen* v. *Craven*, 4 Taunt., 644 [1812]; *White* v. *Wilks*, 5 Taunt., 176 [1813]; *Whitehouse* v. *Frost*, 12 East., 614 [1810], as to unappropriated goods. As to railway receipts, see *The Great Indian Peninsular Railway Co.* v. *Hanmandass Ramkison*, I. L. R., 14 Bom., 57 [1889].

[8] L. R., 1 C. P. D., 445 [1876].

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world. The defendants sold to Burrs & Co. 100 tons of unappropriated zinc and gave them four documents, each containing a specific undertaking in writing to deliver 25 tons of zinc to their order, receiving in payment a bill which was subsequently dishonoured. The plaintiffs bought of Burrs & Co. 50 tons of zinc, and two of the above documents were indorsed and delivered by Burrs & Co. to the plaintiffs, who accepted the bills for the price. Burrs & Co. failed, and the defendants as unpaid vendors refused to deliver the goods to the plaintiffs. It was argued that the defendants having induced the plaintiffs to alter their position to their prejudice upon the faith of the defendants' undertaking to deliver the goods to the indorsed order of Burrs & Co., were estopped from setting up, as against the plaintiffs, their right as unpaid vendors to stop the goods; but the Court held that the documents in question were *not known documents among merchants*, and amounted to a mere undertaking between the plaintiffs and their immediate vendees.

Bills of lading generally not conclusive evidence.

A bill of lading is generally *primâ facie* and not conclusive evidence against the shipowners.[1] In *Grant* v. *Norway*,[2] the master of a ship signing bills of lading for goods which had not been shipped was held not to be the agent of the owner so as to make the owner responsible to the indorsees of the bills who had made advances upon the faith of the bills so signed. *Cox* v. *Bruce*[3] is a similar case. The representation in these cases was made by the master without authority, and the nature and limitations of that authority being known in the mercantile world, the indorsees of the bills were not justified in assuming that the master had authority to sign. In *Lishman* v. *Christie*,[4] however, the charter-party provided that the bill of lading should be conclusive evidence as against the owners as to the quantity of cargo received. It was held that the shipowners were estopped by the statement in the bill of lading from denying that the full amount of cargo stated therein had been shipped.

Estoppel by acceptance of difference note.

The case of a difference note accepted in part payment of a debt is illustrated by *The Scinde, Punjab and Delhi Bank* v. *Mudoo-*

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[1] See *Lishman* v. *Christie*, L. R., 19 Q. B. D., 333 (340), *per* Lopes, L. J. [1887].

[2] 10 C. B., 665 [1851].

[3] L. R., 18 Q. B. D., 147 [1836].

[4] L. R., 19 Q. B. D., 333 [1887].

sooden Chowdry,[1] an action for the non-acceptance of Government paper. The defendants admitted a previous debt, but pleaded that they had paid a sum in cash and a further sum into Court, and that, in respect of the balance due, the plaintiff Bank had accepted an assignment of a debt due by A to B in the shape of a difference bill accepted by B in part payment of the amount due. On the part of the plaintiff, it was alleged, that this assignment was offered to them as a part payment of the debt due by the defendants, but that they had refused to receive it in that light, and that it had been taken by them as a banking transaction for realisation on behalf of A. The document of assignment was in the nature of a promissory note. Phear, J., after pointing out that the transactions between the parties were of a gambling nature and that no equities arose upon the case, remarked: "The plaintiffs admit the receipt of the document and a Court of law must look at the document itself . . . Mr. Lathbury admits consideration, and fairly says that if he had read the document more carefully he never could have received it at all. But there are two parties to the contract—the Bank took the document, and unless the other parties were aware that it was taken with modification or alteration in its terms, they must be bound by it . . . The Bank have had the paper in their custody ever since. I must, therefore, conclude that the suit at all events was premature."

(*d*) Accounts.

The estoppels which may arise in connection with the rendering of Accounts requires mention. In *Van Hasselt* v. *Sack*[2] certain agents and brokers in London supplied coals to a steamer in the year 1856. As agents of the ship they received the freights payable in London, and out of the proceeds furnished supplies, and paid the expenses incurred by the steamer in England, making out debit and credit accounts upon each voyage which they forwarded to the owners abroad, including in the accounts the coals supplied upon each voyage. These accounts showed a balance of £1-4-6 against the owners, but it appeared that upon a previous agency account from 1854 to 1856 a further sum was due to the agents. The

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[1] Bourke, O. C., 322 [1865].

[2] 13 Moo. P. C., 185 [1859]. *See* this case *sub nom. The West Friesland*, 1 Swa., 156. See *Cave* v. *Mills*, 7 H. & N., 913 [1862]; *Shaw* v. *Picton*, 4 B. & C., 715 [1825]; *Dails* v. *Lloyd*, 12 A. & E. (Q. B.), 531 [1848]; *Skyring* v. *Greenwood*, 4 B. & C., 281 [1825], as to accounts. As to retention of cheque on account see *Day* v. *McLea* [1889], L. R., 22 Q. B. D., 610.

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Estoppel against agent appropriating, in accounts with principal sums received, to credit of specific items.

agents appropriated to this previous account the sums received by them in 1856, and brought a suit for the price of the coals supplied in that year as necessaries supplied and paid for, in order to obtain a charge upon the ship. Their Lordships of the Privy Council observed: "There is no principle which can enable the respondents thus to make the supplies of coals a separate and distinct account;" and held that the arrest of the ship was unjustifiable.

Principle of election.

The general principle is stated by Bayley, J., in *Simson* v. *Ingham*[1]: "A party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money." But the election is not complete until communicated to the opposite party. The case now cited was one between bankers, and the following rule was laid down as to banker's pass books:—"If a book had been kept for the common use of both parties as a pass book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit."[2]

Banker's pass books.

In *Lalla Bunseedhur* v. *The Bengal Government*,[3] the defendant became surety under a bond to Government for the treasurer of a Collectorate. The Collector yearly examined the accounts and struck a balance which he certified to be correct, and the defendant on each occasion executed a new bond, but the old bonds were not cancelled. It was found that the treasurer had embezzled moneys each year. In a suit to recover the amounts it was argued that the new bonds were given upon the faith of the accounts being found correct, but their Lordships of the Privy Council held that no question of

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[1] 2 B. & C., 65 [1823]. *See* Act IX of 1872, ss. 59, 60, 61. *See* for the effect of an admission as to the rate of interest in an account stated by a banker. *Makundi Kuar* v. *Balkishen Das*, I. L. R., 3 All., 328 [1880].

[2] *Ib.*, 73, *per* Bayley, J.

[3] 14 M. I. A., 86 (89) [1871].

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estoppel arose, observing, p. 89: "There must be such gross negligence as almost to amount to a participation in the fraud, before the fact of the Government examining into the accounts and not discovering the frauds sooner could operate as a discharge. The object of having securities is, that if secret embezzlements take place, the Government may have a security upon which they can rely."

It may be mentioned that the register, flag, and pass of a ship carry with them the presumption that they are true and correct, and the owner is not at liberty to aver against them.[1]

(e) Awards and agreements to refer to arbitration.

In this connection the conclusiveness of awards and agreements in writing to refer to arbitration may be noticed. Contract and agreement between the parties being a clear and well-defined ground of relief,[2] the Courts will enforce an award made upon a submission to arbitrators on whose part no misconduct or mistake appears. So where two widows of a deceased Hindu agreed to refer the question of their rights to arbitrators (including the question whether the plaintiff had not been separated from her husband during his lifetime, and had not received a fixed allowance from him, having become disentitled to succeed him on account of her unchastity), their Lordships of the Privy Council held the award to be binding and remarked: "The arbitrators, so far as appears, were gentlemen of some position in the neighbourhood, and apparently must have been well competent to decide such a question as this between the two widows. It may also be observed that probably it was the very best tribunal to which a dispute of this kind could be referred."[3]

Tribunal appointed by the parties.

In *Commins* v. *Heard*[4] the question was whether the plaintiff was concluded by an award from alleging that the entire amount of his claim was due to him. Lush, J., said: "I am of opinion that he is concluded, and that the award is binding between the parties in all matters which it professes to decide. It was contended that an award is not an estoppel, and that the parties are not concluded by an award, and that it is distinguishable from a judgment, which it is admitted would have bound the parties. The contention was

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[1] See *The Laura*, 12 L. T. Rep. (N. S.), 685 [1865].

[2] *Per* Lord Westbury in *Eshen Ch. Singh* v. *Shama Ch. Bhutto*, 11 M. I. A., 7 (21) [1866].

[3] *Rani Bhagoti* v. *Rani Chandan*, I. L. R., 11 Calc., 386 [1885].

[4] L. R., 4 Q. B., 669 (672) [1869].

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that it was so distinguishable, because an award was an adjudication by a tribunal appointed by the parties, and not one constituted by the sovereign power within the realm. It is impossible, to my mind, to suggest any good ground of distinction between these two, when we consider that the reason why a matter once adjudicated upon is not permitted to be opened again, is because it is expedient that there should be an end to litigation. When once a matter has been decided between parties, the parties ought to be concluded by the adjudication, whatever it may be. . . . It is not a new doctrine that an award is a bar."[1]

Interest reipublicæ ut sit finis litium.

A fortiori an award followed by the judgment of the Court is conclusive upon the matters in issue, and, as between the parties, has the same effect as an ordinary judgment of a competent Court.[2]

Award invalid in part may yet have legal validity.

In *Muhammad Newaz Khan* v. *Alam Khan*,[3] a suit to establish a claim to share property by right of inheritance, an award was held to operate as a bar to the suit. An application to file the award under section 525 of the Code had been rejected on the ground that the office of a lumberdar to which the award (*inter alia*) related was not a matter of civil jurisdiction. The Judicial Committee held that, although the application under section 525 was refused, that merely left the award to have its ordinary legal validity, remarking: "In order to make the refusal to file an award a binding judgment against its validity on the ground of the partiality of the arbitrator, it would be at least necessary to shew that the point was definitely raised and put in issue and made the

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[1] "The award of an arbitrator concludes the right unless you can impeach the award." *Whitehead* v. *Tattersall*, 1 A. & E., 492 [834]; "I think that the kind of *admission* which has been relied on here is to be taken advantage of, not as an estoppel, but as shewing that there was no cause of action." *Per* Campbell, C. J.: "The principle of estoppel is that whether there be a cause of action or not, the party cannot allege it. Here the defence is that no cause of action existed," *per* Coleridge, J., in *Parkes* v. *Smith*, 15 Q. B., 312 [1850]. See *per argumentum* in *Newall* v. *Elliott*, 1 H. & C., 797 (800—802) [1863].

[2] *Wazeer Mahton* v. *Chuni Singh*, I. L. R., 7 Calc., 727 [1881]. Parties may by their conduct be held estopped from objecting that the time for filing an award has not been enlarged when they act as if the arbitrator is still exercising a valid authority. *Tyerman* v. *Smith*, 6 El. & Bl., 719 (725) [1856]. *See* this case referred to in *Haines* v. *E. I. Co.*, 6 M. I. A., 485 [1856]. *See* also *Andrews* v. *Elliot*, 25 L. J. Q. B., 1 [1855]. See *Kupu Rau* v. *Venkataramayyer*, I. L. R., 4 Mad., 311 [1881], where the procedure before an umpire was acquiesced in. So parties may by consent agree to a division by an arbitrator being made by steps, *Makund Ram Sukul* v. *Salig Ram Sukul*, L. R., 21 I. A., 47 [1893].

[3] I. L. R., 18 Calc., 414 [1891].

subject of trial. The validity of the award as an award was never directly and substantially in issue in that application. In this action respecting the land alone, the award can be separated as to it from the office of lumberdar."

But in any case the award to be conclusive must be upon the points in dispute, and cannot be held to be a decision by inference.[1] In *Newall* v. *Elliott*,[2] an instructive case, proceedings in Chancery for the infringement of a patent, the validity of which was in dispute, were referred to an arbitrator who awarded that the patent was not illegal and void. The Court of Exchequer expressed an opinion during the argument in an action between the same parties for another infringement that there was no estoppel.

But is only conclusive upon the points in dispute.

Whether submission to, and an award by, a *punchayet* are equally binding, may be doubted. In *Mussamut Rubee Koor* v. *Jewat Ram*,[3] the award of a *punchayet* holding that a Hindoo woman, who subsequently embraced the Mahomedan faith, had by her unchastity forfeited her right to the property claimed, was upheld by the Sudder Dewanny Adawlut, but it appeared that at the time of suit she was living with another man and had acquiesced in the award. In a case from Bombay their Lordships of the Privy Council having regard to the Bombay Regulations[4] which prevent the decision of a *punchayet* from being considered as a regular award, and to the conduct of the parties, held that no effectual reference to arbitration had taken place, and that the decision of the *punchayet* fixing a line of boundary might be shewn to be inequitable.[5] "Viewed as a matter of agreement," said their Lordships, "it would be unsafe to rely upon it."

Submission to, and award by, punchayet.

In the class of cases now under consideration the contract between the parties is to be looked to. Thus in *Carlisles Nephews & Co.* v. *Ricknauth Bucktearmull*,[6] the contract provided that all disputes between the parties were to be referred to arbitration, but there was also a stipulation that the plaintiffs were not to sell goods of a certain description to any one but the defendants before the 1st

The contract between the parties is to be regarded.

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[1] "Every estoppel, because it concludeth a man to acknowledge the truth, must be certain to every intent, and not to be taken by argument or inference." Co. Lit., 325*b*.

[2] 1 H. & C., 797 [1863].

[3] 2 Sel. Rep., Ed. 1868, 332 [1818].

[4] Bom. Reg. XVII of 1827, Ch. 2, s. 734; Bom. Reg. VI of 1830, ss. 4, 5.

[5] *Mokuddims of Mouza Kunkunwady* v. *Enamdar Brahmins*, 7 W. R. (P. C.), 8 [1845].

[6] I. L. R., 8 Calc., 809 [1882].

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December 1881. The plaintiffs, in breach of this stipulation, on the 15th August 1881 contracted with other buyers for the sale of goods of the same description at a lower price, on the terms that the goods were not to arrive in Calcutta till after the 31st December. The defendants, relying upon this breach, refused to accept any goods under the contract, and refused to pay damages to the plaintiffs or to go to arbitration. The plaintiffs then appointed an arbitrator who awarded in their favour the difference between the contract price and the market value of the goods. The plaintiffs sued for this amount and relied upon the arbitration clause, which provided that, if either buyers or sellers failed to name an arbitrator within two days, the decision of the arbitrator named by the other party was to be final. The Court held that the defendants were not estopped by this clause from setting up the plaintiffs' breach of the stipulation that they were not to sell other goods within the time limited. The stipulation itself amounted to a condition precedent to any obligation attaching to the defendants to accept any of the goods.

Provisions of Act I of 1877

The questions arising in this class of cases are, it is apprehended, to be determined by a reference to the terms of the Specific Relief Act[1] and the Code of Civil Procedure.[2] By section 21 of the former enactment, no contract to refer to arbitration shall be specifically enforced save as provided by the Code of Civil Procedure; "but if any person who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such a contract shall bar the suit," and he will be estopped from denying the contract upon the faith of which the other party has relied.

and Act XIV of 1882.

The Code of Civil Procedure[3] provides for awards made in pending suits which may be made decrees of the Court,[4] for private agreements to refer to arbitration which may be filed in Court and enforced in like manner,[5] and for the enforcement of awards made in private references to arbitration.[6] The grounds upon which the Court may modify, correct, remit, or set aside such awards are enumerated in sections 518 – 521.

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[1] Act I of 1877.
[2] Act XIV of 1882.
[3] Act XIV of 1882.
[4] Act XIV of 1882, ss. 506—522.
[5] *Ib.*, ss. 523, 524.
[6] *Ib.*, ss. 525, 526.

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CHAPTER XI.

Admissions in the Course of Judicial Proceedings.

Admissions in the course of Judicial Proceedings—Connect the two branches of estoppel —Rule stated in two ways—1. Has a material issue been tried upon the admission; if so, the admission works an estoppel—*Civa Rau Nanaji* v. *Jevgna Rau* [1864].—2. Conclusive admissions are referable to the rule of estoppel by conduct—A party may not approbate and reprobate—Parties may not vary their case on appeal—Estoppel by consent to material step in proceedings—Mistake may be shewn where no change of position—Admission must relate to an existing fact—Estoppel by conduct in course of previous suit—Waiver of rights—Conduct causing the other party to alter his position—A party may not take up inconsistent positions—Conduct must be unequivocal, that is, the estoppel must be clearly made out—The consideration for the act must be looked to and the circumstances are to be examined—*Musst. Oodey Koowur* v. *Musst. Ladoo* [1870]—Admission must be between the same parties—Rule where admission is by pleading—Statements made to defeat third parties—Admissions are in all cases evidence—Agreements not to appeal—Distinguishable from agreements purporting to oust jurisdiction—Privy Council, Allahabad, and Calcutta decisions—Compromises *pendente lite*—How enforceable, s. 375, Act XIV of 1882—Conflict of authority—Principles upon which compromises are enforced—The conduct of the parties is to be regarded—Abandonment of compromise—Agreements in supersession of decrees, when sanctioned by the Court—*Pisani* v. *Attorney-General of Gibraltar* [1874]—*Sadasiva Pillai* v. *Ramalinga Pillai* [1875]—Calcutta decisions—Allahabad decisions—Suggested rule—Judgment-debtor not estopped by conduct in execution-proceedings.

Admissions in the course of Judicial Proceedings.

It has been seen that Admissions are rules of Evidence founded upon Representations and closely allied to them but less powerful in degree, being statements suggesting inferences as to facts but not operating as conclusive proof of the matters admitted. Representations made in the course of Judicial Proceedings may amount to an estoppel, or may only be regarded as evidence upon the subject-matter of the admission.[1]

Connect the two branches of estoppel.

The rule as to the conclusiveness of admissions made in the course of judicial proceedings appears to form the connecting link between the subject of Estoppel by Representation and the subject of Res Judicata.

Rule stated in two ways.

The general rule has been stated in terms to be that, to raise an estoppel by admission in previous judicial proceedings, a particular

[1] Evidence Act I of 1872, ss. 17—31. See *supra*, pp. 4, 20, & 21.

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issue must be tried, and material facts found affirmatively,[1] and in this view the subject approaches very closely to res judicata. But parties may, by their conduct be held estopped from denying the effect of their admissions in previous proceedings, even where no issue has been expressly decided, and it is apprehended that all conclusive admissions are referable to conduct.

(1) Has a material issue been tried upon the admission? If so, the admission works an estoppel.

In a Calcutta case[2] Sir Barnes Peacock accentuates the test first indicated. In a suit for rent it was found that a pottah, which had been filed in two previous suits (in which its validity was not enquired into) was not genuine. The plaintiff sought to have the defendant estopped by an admisson made by him in one of the previous suits to the effect that he held under a *maurasi* pottah. The Chief Justice remarked: "If a particular issue had been tried in the former suit, *and that issue was material*, then it might have amounted to an estoppel." In *Srimut Rajah Moottoo Vijaya* v. *Katama Natchiar*[3] it appeared that the appellant, in a former appeal to the Privy Council, had abandoned his claim under a will. The decision being against him, he instituted a fresh suit to establish the will. It was held that the former Privy Council decision operated as res judicata as a suit heard and determined by a Court of competent jurisdiction, the validity of the will being *properly at issue in the first appeal*.

The same rule is laid down in a less concise form in a Madras case[4] to the following effect:—"A statement for the purpose of a judicial proceeding can only be conclusive in another proceeding as to such material facts embodied therein as have been found affirmatively to warrant the judgment of the Court upon the issues joined. Such statements are only representations, and can only be conclusive if the other party has acted upon them and has altered his position. They are conclusive, not merely because they are the statements of the parties, but because, for the purpose of present and prospective litigation, they must be taken to be the truth.

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[1] *Civa Rau Nanaji* v. *Jevana Rau*, 2 Mad. H. C. 31 [1864].

[2] *Tweedie* v. *Poorno Chunder Gangooly*, 8 W. R., 125 [1867] distinguishing *Koylash Chunder Ghose* v. *Khettermonee Dossee*, 2 W. R., Act X, Ru. 57 [1865].

[3] 11 Moo., I. A. 50; 10 W. R., (P. C.), 1 [1866]. See *Oomanath Roy Chowdhry* v. *Roghonauth Mitter*, Marsh., 43; W. R., 1862 to 1864 (F. B.), 10; *Bepin Beharee Sircar* v. *Rajah Nilmonee Singh*, 25 W. R., 125 [1876].

[4] *Civa Rau Nanaji* v. *Jevana Rau*, 2 Mad. H. C., 31 [1864] approved in *Vallabh Bhula* v. *Rama*, 9 Bom. H. C. R., 65 [1872]. See *Abdul Rahim* v. *Madhavrav*, I. L. R., 14 Bom., 78 (82) [1889].

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Admissions which do not come within this description are receivable in evidence against the parties making them and those claiming under them, but do not amount to an estoppel.[1]"

Civa Rau Nanaji v. Jevana Rau [1864].

In the case now cited the plaintiff's predecessor in title, Sundarabayi, in 1846 sued as a pauper disclaiming the possession of certain property, and the defendant's father petitioned to dispauper her, and obtained the decision of the Court, in a miscellaneous proceeding, that Sundarabayi was then in possession of this very property. The plaintiff now sued for the same property, and was met by the objection that he was estopped by Sundarabayi's disclaimer in the pauper suit. The Court held that, even if the disclaimer could operate as an estoppel, the allegation of the defendant's father found to be true by the former Court would also be an estoppel, and "estoppel against estoppel setteth the matter at large;"[2] that under the system of pleading in India the statements of the parties in the previous suit might be treated as estoppels or admissions within the definition of the above rule,[3] but that Sundarabayi's disclaimer had never been acted upon in the proceeding to dispauper her, because the defendant's father successfully proved Sundarabayi's statements to be false, and her representation that she had no property could not conclude the plaintiff.[4]

(2) Conclusive admissions are referable to the rule of estoppel by conduct.

It is apprehended that the rule of estoppel by conduct is the rule by which this class of cases is to be determined. In many of the

[1] 2 Mad. H. C., 34. *See* the definition of pleadings in *Sayad Muhammad* v. *Fatteh Muhammad*, I. L. R., 22 Calc., 324 [1894].

[2] Co. Inst., 352*b*.

[3] "It is true," observed Phillips and Holloway, JJ., "as pointed out by Baron Parke [*Boileau* v. *Rutlin*, 2 Exch., 662 (1848)] that an estoppel *in pais* need not be pleaded in order to make it obligatory. The present admission falls under the class of admissions made by statements in the course of judicial proceedings; and as to bills in equity and pleadings at Common Law the following rule is given by Baron Parke:—'It would seem that those (bills in equity) as well as pleadings at Common Law are not to be treated as positive allegations of the truth of the facts therein for all purposes, but only as statements of the case of the party to be admitted or denied by the opposite side, and if denied to be proved and ultimately submitted for judicial decision.' There is no doubt whatever that with our system of pleading we could not properly exclude any allegation of a party, as the Court in *Boileau* v. *Rutlin*, excluded this bill in equity. That rule rests, as we all know, upon the wholly fanciful character of such documents."

[4] The Court referred to the principle of *Pickard* v. *Sears* [6 A. & E., 469] and *Freeman* v. *Cooke* [6 Exch., 654], as explained by Lord Campbell in *Howard* v. *Hudson* [2 El. & Bl., 10] and observed: "It is unnecessary now to discuss the wild lengths to which this principle was pushed in some cases in England and by many in this country." To this may be added the remark of the Privy Council in *Surendro Keshub Roy* v. *Doorga Soondery Dossee*: "The word 'estop' is often used in Indian cases very loosely to denote obligations which do not rest upon estoppel at all" [I. L. R., 19 Calc., 532].

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cases hereafter to be noticed the issue between the parties was raised only by implication. In considering these cases, it will be found that the position of the party affected is chiefly to be looked to.

A party cannot approbate and reprobate in respect of the same matter.

The rule, in whatever manner stated, amounts to this, that a party cannot approbate and reprobate in respect of the same matter.[1] Thus, where the defendant accepted the plaintiff's valuation of certain consolidated suits in an appeal to the High Court, it was held that she could not afterwards be allowed to object to the valuation for the purpose of hindering an appeal to the Privy Council. "She had," as their Lordships of the Privy Council observed, "obtained the benefit of an appeal to the High Court by adopting the plaintiff's valuation. She cannot afterwards come here and object to that valuation. The Judge ought to have given more weight to the *acts* of the parties, and not have rejected the application on the ground of value."[2]

Parties may not vary their case on appeal by receding from admissions made in the Court below.

It is more or less a clear principle that parties are not allowed to vary a case which they have set up in a lower Court.[3] In *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry*,[4] Couch, C. J., observed: "When parties allow a suit to be conducted in the lower Courts as if a certain fact were admitted, they cannot afterwards, in special appeal, question it and recede from the tacit admission. I acted upon this principle in *Devaji Goyaji* v. *Godadbhai Godebhai*,[5] which was appealed to the Judicial Committee of the Privy Council, and the judgment was confirmed. There being an objection that there was no evidence to connect the plaintiffs with the parties to a certain deed, I said: 'This objection was not taken in the grounds of appeal to the Judge, and appears not to have been taken before the Munsif. The suit appears to have been conducted as if this were admitted; and when that is the case, we think an objection of want of evidence of the fact cannot be taken on special appeal. *Stracy* v. *Blake*[6]

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[1] *Kristo Indro Saha* v. *Huromonee Dassee*, L. R., 1 I. A., 84 (88) [1873]. See *supra*, p. 142 (*n*) 5.

[2] *Ib.* *See* L. R., 1 I. A., 84 (88).

[3] See *Nidha Choudhry* v. *Bundah Lal Thakoor*, 6 W. R., 289 [1866].

[4] 15 B. L. R., 142; 23 W. R., 174 [1875]. 2 Bom. H. C., 28 [1865].

[5] 1 M. & W., 168 [1836]: "If the parties have a particular controversy, and it seems plain that a certain fact is admitted between them in the course of that controversy, may not the jury, as men of common sense, draw the same conclusion as to that fact as if it were formally proved before them?" *Per* Alderson, B., at p. 173.

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and *Doe dem. Child* v. *Roe*[1] are instances of the application of this principle.'"

In *Motichand* v. *Dadabhai*[2] the plaintiff contended successfully before the lower Court that his suit was merely for a declaration of title to a house, that he did not seek any consequential relief, and that therefore a ten-rupee stamp was sufficient for his plaint. Upon appeal by the plaintiff it was objected that no appeal lay, and the plaintiff thereupon contended that the subject-matter of the suit was the house to which he sought to have his right declared, and that the value of the subject-matter was the value of the house itself. The Court decided the case upon another point, but doubted whether the plaintiff could be permitted to alter his case on appeal.

Estoppel by consent to material step in proceedings.

So where a special appellant consented to a remand of the case by the lower Court, he was not heard on appeal to say that the remand was illegal, and the High Court observed: "When a party submits, without making all the resistance in his power, to the taking of any material step in proceedings, he cannot afterwards be heard to complain of the legality of the step as an integral part of the proceedings.[3] In *Collier* v. *Walters*[4] it was held that the plaintiff, having raised the question of the construction of a will in a suit to which he was not properly a party, was bound by the decision in that suit. And where a party has taken an active part in proceedings and contested the case upon the merits, he cannot afterwards say in special appeal that he has been unnecessarily made a party although that may be the fact;[5] and, *à fortiori*, where a plaintiff has made another person a party to the suit, he cannot get rid of the effect of his own act.[6]

Where the vakils on both sides have accepted certain issues and no mistake or misapprehension is shewn, it would appear that the parties will be confined to such issues.[7]

Mistake may be shewn where no change of position.

But a party to a cause who is proved to have made admissions may defeat their effect by shewing that they were made under

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[1] 1 E. & B., 279 [1852], where an order for inspection of a lease was made on the assumption that a statement, not being disputed, was admitted to be true in fact.

[2] 11 Bom. H. C., 186 [1874].

[3] *Gholam Murteja Chowdhry* v. *Goluck Chunder Roy*, 3 W. R., 191 [1865].

[4] L. R., 17 Eq., 252 [1873].

[5] *Kristo Gopal Shaha* v. *Kasheenauth Shaha*, 6 W. R., 66 [1866].

[6] *Sham Chand* v. *Doya Moyee*, 9 W. R., 338 [1868].

[7] *Mussamut Sabitra Monee* v. *Mudhoo Soodun Singh*, Marsh., 519 [1863].

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mistake of law, provided that no person has been induced by them to alter his condition ;[1] and an estoppel, as already pointed out, must, in order to be operative, relate to an existing fact. Thus in *Meryan* v. *Couchman*,[2] a statement in an affidavit filed by the plaintiff in bankruptcy proceedings was held not conclusive, so as to prevent him from recovering the debt from the true debtor, since the allegation as to payment by the defendant therein contained was not one of fact, but of an inference of law drawn by the plaintiff. In discharging a rule which had been obtained, Maule, J., observed : "I confess that if I had had to deal with the whole matter, I should have thrown the affidavit overboard altogether."

Admission must relate to an existing fact.

Waiver of rights.

Parties may by their conduct in the course of a suit preclude themselves in a subsequent suit from asserting rights which they have waived deliberately. In *Janaki Ammal* v. *Kamalathammal*,[3] A sued B as owner by right of inheritance to recover the property of her deceased husband, and B defended upon the ground of her preferable right to inherit, designedly suppressing a family agreement between her and A's husband, varying the ordinary rules of inheritance. In that suit A succeeded, and B then sued A to recover half the property upon the basis of the family compact. The Court held that she could not be allowed to do so, since she had waived her rights.

Conduct causing the other party to alter his position.

So where the defendants in a previous suit set up the defence that the plaintiff's father was disqualified by insanity, and took the decision of the Court on that ground, and prevented the plaintiff from obtaining possession, it was, in a subsequent suit brought by the plaintiff as heir to establish his title, held that the defendants were estopped from saying that the plaintiff's father was not disqualified. They could not be allowed to come into Court and plead one defence, and then, having forced the plaintiff to take up the

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[1] *Newton* v. *Liddiard*, 12 Q. B. (A. & E.), 925 [1848].

[2] 14 C. B., 100 [1853]. See *supra*, pp. 32, 33.

[3] 7 Mad. H. C., 263 [1873]. Holloway, Actg. C. J., observed : "The plaintiff now insists upon a valid family compact, varying the ordinary rules of inheritance. She has, however, previously appealed to that general rule, litigated the matter through three Courts, designedly keeping back the compact upon which she now seeks to insist. There can be no stronger case of an absolute waiver of that contract and of conduct rendering it wholly inequitable to permit her now to insist upon it."

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position which they then assigned to him, turn round and say that he ought to go back to his former position.[1]

A party may not take up inconsistent positions.

In a suit upon a mortgage the defendant, upon his construction of the transaction, contended that the suit was premature, and the Court accepted that view rightly or wrongly. The plaintiff again sued after the due date, and the defendant pleaded limitation. It was held that it was not open to him to raise the defence.[2]

Landlord and tenant.

An example of the principle of estoppel is to be found in a case where a tenant in a rent-suit sets up an adverse title under a third party, and the landlord, instead of proceeding to enforce his claim for rent, withdraws the suit and brings an ejectment. The tenant by his admission in the former suit has forfeited all right to remain upon the land. "He cannot one day say that he does not hold under the plaintiff, and the next day, when the plaintiff takes him at his word, turn round and say that he is going to continue his tenant."[3]

In *Sutyabhama Dassee* v. *Krishna Chunder Chatterjee*,[4] the defendants sold the lands in suit to the plaintiff in 1844, and continued in possession as her tenants till 1872, when she called on them to quit, and they disclaimed her title by parol. In answer to a suit for ejectment the defendants set up an adverse title in themselves, but being defeated upon that ground they contended in the lower Appellate Court, in the alternative, that they were occupancy raiyats and could not be ejected. This fact had been established by the plaintiff's own evidence in the first Court, but the High Court held that the defendants should not be allowed to change the whole nature of their case, and set up on appeal a

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[1] *Brij Bhookun Lall Awustee* v. *Mohadeo Dobey*, 17 W. R., 422; 15 B. L. R., 145 (*n*) [1872].

[2] *Musst. Bibee Efatoonnissa* v. *Khondkar Khoda Newaz*, 21 W. R., 374 [1874].

[3] *Dabee Misser* v. *Mungur Meah*, 2 C. L. R., 208 [1878]; *Sonaollah* v. *Imamooddeen*, 24 W. R., 273 [1875].

[4] I. L. R., 6 Calc., 55 [1880]. "It may be," said Garth, C. J., "that if the defendants had merely verbally disclaimed their landlord's title before suit, and had pleaded their occupancy title when the suit was brought, their parol disclaimer might not have affected their real rights; or even if the defence had been founded upon a *bonâ-fide* mistake, and they had found out their mistake in the course of the trial, and had applied to withdraw their defence and plead their right of occupancy, it is possible that (subject to the question of costs) they might properly have been allowed to take advantage of their true position. But that certainly was not the case here. We think that by their own conduct they have forfeited the right which they now claim, and that the Court ought not to assist persons who knowingly attempt these frauds."

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plea which they had directly and fraudulently repudiated in the Court below.[1] So where the plaintiff claimed to be full owner, having purchased the right of occupancy from previous tenants on the land, and the lower Court held that the plaintiff's vendors were mere yearly tenants and that the suit must succeed because no notice to quit had been given, it was held that the plaintiff could not avail himself of the want of notice.[2]

Admission as to annuity.

In *Roberts* v. *Madocks*,[3] the grantor of an annuity had admitted, in his answer to a bill in Chancery, that the annuity was a subsisting charge on his estates, and the decree and proceedings in the suit had treated the annuity as valid. The grantor's devisee was restrained from proceeding at law to set aside the annuity for want of a memorial.

As to construction of contract.

And where a party has placed a certain construction upon a contract in the course of a suit, he may, under certain circumstances, be estopped from asserting that it was different from what he has alleged.[4]

Conduct must be unequivocal, that is the estoppel must be clearly made out.

But, in order to raise an estoppel, the conduct which is relied upon to produce that effect must be shewn to be unequivocal, and the admission must be clearly made out. Thus, to petition for the postponement of a sale in execution of a decree is not an intentional causing or permitting the decree-holder to believe that the judgment-debtor admits that the decree can be legally executed. In *Mina Konwari* v. *Juggut Setani*,[5] it was contended that the respondent by filing such petitions had virtually admitted the pendency of the execution, and was, therefore, estopped from saying that the execution was barred by limitation. But their Lordships of the Privy Council held that the petitions to postpone the sale could not be treated as an estoppel within the description given in the Indian Evidence Act. In the same way where certain persons at an auction-sale purchased a house to which they claimed to have a

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[1] *See* note 4, p. 245.

[2] *Lalu Gopal* v. *Bai Motan Bibi*, I. L. R., 17 Bom., 631 [1892].

[3] 13 Sim., 549 [1843].

[4] See *McConnel* v. *Murphy*, L. R., 5 P. C., 203 (220) [1873], where the insertion of an alternative case in the plaintiff's declaration was held not to interfere with other independent statements, shewing substantially what the contract was.

[5] I. L. R., 10 Calc., 196; L. R., 10 I. A., 119 [1883]. See *Thakoor Mahatab Deo* v. *Leelanund Singh*, I. L. R., 7 Calc., 613 [1881]; *Girdhari Singh* v. *Hurdeo Narain Singh*, L. R., 3 I. A., 230 [1876]; *Watson & Co.* v. *Sham Lal Mukter*, I. L. R., 15 Calc., 8 [1887]; *Raman* v. *Kunhayan*, I. L. R., 17 Mad., 304 [1893].

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title already, it was held that they were not estopped from shewing their title as against one who claimed to be a mortgagee prior to the sale. Their conduct in making the purchase could only be regarded as some evidence of an admission of title in the mortgagee, which evidence they could explain or rebut ; and they may have thought it would be more to their interest to pay a small sum and purchase the supposed rights of the judgment-debtor than to engage in litigation to vindicate their title.[1]

The consideration for the act must be looked to, and if the act may reasonably be explained upon any other hypothesis no estoppel is to be presumed.

The consideration for the act is to be looked to, and the circumstances are to be examined.

In *Mussamat Oodey Koowur* v. *Mussamat Ladoo*[2] the plaintiff had, in a previous suit, in order to avoid an objection taken as to parties, filed a petition disclaiming all interest in the estate to which she had then only an expectant right, but to which she became afterwards entitled absolutely. The defendant contended that this act raised an estoppel, and that the plaintiff had abandoned her right to the property. Their Lordships of the Privy Council upon this point observed : "If that is to prevent her recovering the property now in question, it must do so either because it operated as a conveyance or as a contract to convey the interest which she now claims, or because it operated by way of estoppel...Their Lordships are of opinion that it is quite impossible that it could so operate [as a conveyance or a contract], and that for two reasons : first, because at the time when she presented this petition she had not in fact any interest in the property at all, and certainly had not become entitled to any interest as the heir of her son, who was at that time alive ; and, in the next place, there is not the least reason to suppose that in the petition she in any degree contemplated a conveyance of any such right. That was not the right which they were considering at all. The main object of the petition was simply to enable the redemption suit to go on...Is she in any way estopped ?.. Even assuming that it does refer to her interest as owner, that is to say, to her present interest as owner, and that she is assuming incorrectly that she has some interest as heir of her husband, their Lordships are of opinion, that her stating that, and

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[1] *Pandit Hanuman Dat* v. *Mufti Assadullah*, 7 N.-W. P., 145 [1875].

[2] 13 M. I. A., 585 (598) [1870].

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professing to resign that in favour of Oodey Koowur could not possibly in point of law estop, or prevent her from setting up her real right as heir of her son when that right actually accrued. There is in the first place no consideration whatever for this conveyance of her particular interest; even if she had it she receives nothing for it. Neither does Oodey Koowur act on any representation made by her or alter her position in any way. There is no misrepresentation to Oodey Koowur of any sort or kind. Oodey Koowur was acquainted with the real facts of the case, just as much as Mussamat Ladoo was. The real effect of the petition seems rather to be that they mutually agreed to represent what was not the fact, for the purpose of enabling a certain suit to be carried on."

Consideration.

Admission must be between the same parties.

It follows from the above cases that the admission to be operative must be between the same parties or those claiming under them. In *Vizianagaram Maharaja* v. *Suryanarayana*,[1] certain inamdars, in a suit by mortgagees to enforce mortgage rights existing since 1842, pleaded in defence that the Collector had taken possession of the inam lands in 1845, and had determined the inam rights as well as the lien of the mortgagees. Subsequently the zemindar sued the inamdars, claiming to have determined their rights by a notice to quit. The Judicial Committee held that the inamdar's admission in the former suit (to which the zemindar was no party) could not operate as an estoppel, but only as an admission, and was not conclusive as such.

Rule where the admission is by pleading.

In the case last cited the admission was by pleading.[2] It has been held by the Judicial Committee that a pleading by two defendants against the suit of another plaintiff can never amount to an estoppel as between them,[3] and the rule next to be noticed, that persons against whom an admission is sought to be used as conclusive, may shew the truth, has been applied to erroneous admissions

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[1] I. L. R., 9 Mad., 307 [1885]. See *Khanto Monee Debia* v. *Koomodinee Debia*, 25 W. R., 69 [1876]; *Chunder Kant Chuckerbutty* v. *Pearee Mohun Dutt*, 5 W. R., 209 [1866].

[2] In *Bhugwandeen Doobey* v. *Myna Baee*, 11 Moo. I. A., 487 (497) [1867], the Judicial Committee observe: "But this misplead-ing has in no degree prevented the settlement of proper issues, or prejudiced the fair trial of the real question of right between the parties; and that being the case, it would be contrary to the practice of their Lordships to give effect to nice and critical objections founded on the inaccuracy of an Indian pleading."

[3] *Ram Surun Singh* v. *Musst. Pran Pearee*, 13 M. I. A., 551 (559) [1870].

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in pleadings made by pure mistake.[1] So in a suit for land, where the defendant pleaded that the property was his ancestral estate, but subsequently obtained evidence to shew that the land had many years before been mortgaged to, and bought by, his father, the Court observed: "Respecting transactions of so remote a date it is quite possible that the defendant may have been without specific information until he met with the aforesaid revenue documents, which shew the nature of his title. We are, therefore, of opinion...that he was not estopped...by his previous erroneous plea."[2]

But where a defendant by his written statement pleaded that if an account were taken between him and his partners, he would be found not to be indebted to the plaintiff, it was held he could not also plead limitation as a bar to the taking of the account.[3]

Truth may be shewn.

The rule that justice will be done by allowing the parties to explain their admissions by shewing the circumstances under which they were made is supported by numerous cases, but the broad rule is still open to discussion in the case of statements made to defeat third parties.[4]

In *Choonee Lal* v. *Shaikh Keramut Ali*[5] the Court remarked: "Certain statements in petition have been made by the parties before us to possession, which are evidently false, and we are required to hold them estopped. We do not think that they should be so held. In such a case the Court will look behind these statements and may determine upon their truth or otherwise and affirm or disallow them as seems right and proper."

Statements made to defeat third parties.

Where in answer to a suit two parties combine to make a statement to defeat a third party, it has been held that it is open to either of those two parties to explain the circumstances and shew that the transaction as between themselves was not a *bonâ fide* one. In such a case the admission is not as between them an

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[1] *Krishto Prea Dossee* v. *Puddo Lochun Mytee*, 6 W. R., 288 [1866]. See *Bissessuree Debee* v. *Jankee Doss Mohunt*, 1. W. R., 162 [1864].

[2] *Ramgcsvami* v. *Kiristna*, 1 Mad., H. C. 72 [1862]. See *Mohendro Nath Mullick* v. *Rakhal Doss Sircar*, 10 W. R., 344 [1868].

[3] *Dayal Jairaj* v. *Khatav Ladha*, 12 Bom. H. C., 97 [1875].

[4] See *supra*, pp. 70—74, 224—227 *Chenvirappa* v. *Puttappa*, I. L. R., 11 Bom., 708 [1887].

[5] W. R., 1864, 282. *See* also *Ram Surohee Singh* v. *Kashee Roy*, 6 W. R., 176 [1866]; *Ram Chunder Dey* v. *Kishen Mohun Shaha*, 6 W. R., 68; *Nowbut Ram* v. *Durbaree Singh*, 2 Agra, 145 [1867]; *Maharaja Jugutendur* v. *Dindyal*, 1 W. R., 310 [1865]; *Sunj Baree* v. *Payag Patuk*, 1 N. W. P. R., Pt. 2nd, ed. 1873, p. 5.

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estoppel, though it would be as between them and the party defrauded. The Court may, therefore, enquire into the transaction and declare it void.[1]

In *Vellayen Chetty* v. *Aiyan*[2] the Court observed: "The whole effect of the defendant's conduct in the former suit amounts to resistance to a just claim, at most an unconscientious proceeding, but certainly not such as to operate either as an estoppel or forfeiture." The fact that the defendant had in a previous suit set up a fraudulent title in his sister did not preclude him from shewing the property to be family property.

Thus the admission of a sheristadar who was forbidden by the nature of his appointment to hold land, was held not to preclude his heirs from shewing their title to the land.[3]

Admissions are in all cases evidence.

It is scarcely necessary to remark that, although in some cases the truth may be shewn, admissions are in all cases evidence against the parties making them, and that, where a party has made a statement inconsistent with the case which he is setting up, that fact may render it more difficult for him to prove his case.[4]

Agreement upon sufficient consideration not to appeal.

An important class of cases in which estoppels may arise requires to be noticed. A party to a suit may be estopped by giving an undertaking, in good faith and for sufficient consideration, not to appeal, and thus obtaining some advantage from the other party. This subject is nearly allied to that of compromises, which will be considered in the next place.

Privy Council decisions.

The subject has come before the Judicial Committee of the Privy Council on more than one occasion. In *Rajmohun Gossain* v. *Gourmohun Gossain*,[5] their Lordships held that a decree of an Appellate Court obtained after a compromise of the matters in dispute was an adjudication obtained not only with great impropriety but in effect by fraud, it being in every sense the duty of the appellant not to prosecute an appeal after a compromise insisted upon by him had been entered into.

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[1] *Ram Sarun Singh* v. *Musst. Pran Pearee*, 15 W. R. (P. C.), 14; 13 M. I. A., 551; 1 W. R., 156; *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia*, 21 W. R., 422 [1874]; *Musst. Ushrufoonnissa Begum* v. *Grirdharee Lall*, 19 W. R., 119 [1872].

[2] 4 Mad. H. C., 374 [1869].

[3] *Shaik Mahomed Wayez* v. *Musst. Sageeroonissa*, 6 W. R., 38 [1866].

[4] Evidence Act (I of 1872), s. 31. See *Yashvant Puttu* v. *Radhabai*, I. L. R., 14 Bom., 312 (315) [1889].

[5] 8 M. I. A., 91; 4 W. R. (P. C.), 47 [1859].

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In *Moonshee Ameer Ali* v. *Maharanee Inderjeet Koer*,[1] the appellant's counsel in the presence, and with the consent, of his client undertook that, in consideration of the Court confining its decision to one point only, the validity of a certain *Mookternamah*, he would not appeal from that decision. Their Lordships held that the appeal ought not to be entertained as it was brought in violation of good faith, the real merits of the case having been withdrawn from the Court below, and observed that there was very good and sufficient consideration for such an undertaking because, by obtaining a decision upon the one point, the case became a case not decided against the appellant, and that it was in fact substituting a non-suit for an adverse verdict, leaving the appellant to bring a fresh suit upon the merits.

Distinguishable from agreements purporting to oust jurisdiction.

Anant Das v. Ashburner [1876].

These cases were decided before the Contract Act,[2] but in subsequent decisions of the Indian High Courts the effect of section 28 of that Act was considered. That section was explained as referring only to agreements purporting to oust the jurisdiction of the Courts. In *Anant Das* v. *Ashburner*[3] the appellant, in consideration of the respondents giving him time to satisfy a decree which they had obtained against him, agreed not to appeal, and upon the appeal contended that the agreement was void under section 28. The Full Bench distinguished the rule as laid down in that section,[4] and held that the rule in *Moonshee Ameer Ali* v. *Inderjeet Koer*[5] governed the case.

Calcutta.

The law as to this point appears to be well settled, and the ruling of the Allahabad Court has been approved in Calcutta in the case of *Protap Chunder Dass* v. *Arathoon*.[6] There the plaintiff took out execution of his decree, and the defendant, in consideration of his being released from arrest, and being allowed to pay by instalments, undertook not to appeal, the decree-holder on his part also agreeing not to appeal in respect of that portion of his claim which he had failed to establish. The judgment-debtor, however, appealed, but the High Court held, following the above decision, that the judgment-debtor, having expressly undertaken

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[1] 14 M. I. A., 203; 9 B. L. R., 460 [1871]. *See* also *Pisani* v. *Attorney-General of Gibraltar*, L. R., 5 P. C., 516 [1874]. The objection to the appeal should be taken at the earliest opportunity.

[2] Act IX of 1872.

[3] I. L. R., 1 All., 267 [1876].

[4] *See* the construction placed upon s. 28 by the Full Bench, I. L. R., 1 All., 268, 269.

[5] 14 M. I. A., 203; 9 B. L. R., 460.

[6] I. L. R., 8 Calc., 455 [1882].

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not to appeal and having induced the decree-holder to forego his rights, was estopped from acting contrary to his deliberate representation and undertaking.

Compromises pendente lite.

Estoppel may also be created by a *bonâ fide* compromise of legal claims *pendente lite*, provided the agreement (upon which the decree has been obtained) has been fully performed by the party seeking to enforce it. The principle in these cases is that of contract, and as heretofore the *criteria* to be considered will be consideration and conduct. As regards agreements in supersession of decrees, where the parties have elected to enter into agreements *contra cursus curiae*, there has been some confusion of opinion as to whether the parties should be relegated to a fresh suit, or whether the agreement will be specifically enforced.

In the year 1839 the Judicial Committee held that a *solehnamah* or deed of agreement to compromise conflicting claims entered into in the presence of witnesses and solemnly acknowledged in Court by parties who were mutually ignorant of their respective legal rights could not afterwards be set aside.[1]

How enforceable, s. 375 of Act XIV of 1882.

Compromises arrived at in the course of judicial proceedings are dealt with in section 375 of the Code of Civil Procedure.[2] There is some difference of opinion in the Indian High Courts as to whether such a compromise becomes *ipso facto* binding before a decree has been passed under the terms of the section, so as to allow of no *locus poenitentiae* to a party who at the last moment wishes to withdraw, or whether the section merely applies to cases where the parties, at the time of moving the Court, agree to have the terms entered into, carried out, and judgment entered up.

Bombay.

The former view was taken in a Bombay case[3] where Scott, J., considered that the section was framed to enforce agreements

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[1] *Rajunder Narain Rae* v. *Bijai Govind Singh*, 2 M. I. A., 181 [1839].

[2] Act XIV of 1882. "If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise, or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise, or satisfaction." As to the grounds upon which such agreements are enforced see *Rajunder Narain Rae* v. *Bijai Govind Singh*, 2 M. I. A., 181 [1839]. As to the authority of counsel see *Jang Bahadur Singh.* v. *Shakkar Bai*, I. L. R., 13 All., 272 [1890]; *Carrison* v. *Rodrigues*, I. L. R., 13 Calc., 115 [1886], and cases there cited.

[3] *Ruttonsey Lalji* v. *Pooribai*, I. L. R., 7 Bom., 304 [1883].

unconditionally made even though one of the parties afterwards desires to withdraw his consent. That learned Judge pointed out that parties can, apart from the section, put in a consent decree or submit to a decree under section 152 of the Code, and that the rule appears to have been devised as an alternative and more expeditious remedy than a suit for specific performance which course is still open to the parties, and his view appears to be supported by the English authorities.[1] The same view has been taken in two cases in the Madras Court.[2] Madras.

The Calcutta High Court have, however, in one reported case taken the opposite view,[3] and have held that the section does not apply where a party is unwilling to have judgment entered up. The learned Judges observe : " The section states that the decree shall be final, so that if it be applied to cases where the agreement is sought to be enforced against an unwilling party, the Court would have no power to refuse specific performance, although if it had been sought to be enforced in a regular suit, specific performance might never be obtained. Again, in one case the decree is final, in the other it is subject to appeal." This ruling has been expressly dissented from in a recent case in Bombay, *The Goculdas Bulabdas Manufacturing Co.* v. *James Scott*,[4] where the question was very fully considered. The view taken in Bombay has been approved in one or two unreported Calcutta cases. Calcutta.

Principle of estoppel.

The view taken in the Madras and Bombay Courts would appear to be more in accordance with the policy of the rule of res judicata which aims at avoiding a multiplicity of suits and determining all matters in controversy once and for all. The real question in each case, so far as estoppels are concerned, must be whether there has been at one point of time a real agreement between the parties, and if that be so, and either party is prejudiced by being induced to cease prosecuting his claims, or in any other way, the doctrine would be available to assist him.

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[1] *See* The Judicature Act of 1873, s. 24, s.-s. 7 ; *Pryer* v. *Gribble*, L. R., 10 Ch., 534 [1875] ; *Scully* v. *Lord Dundonald*, L. R., 8 Ch. D., 658 [1878] ; *Holt* v. *Jesse*, L. R., 3 Ch. D., 177 [1876].

[2] *Karupan* v. *Ramasami*, I. L. R., 8 Mad., 482 [1885] ; *Appasami* v. *Manikam*, I. L. R., 9 Mad., 103 [1885].

[3] *Hara Sundari Debi* v. *Kumar Dukhinessur Malea*, I. L. R., 11 Calc., 250 [1885].

[4] I. L. R., 16 Bom., 202 [1891].

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Principles upon which compromises are enforced.

The subject before us, however, has to deal not only with doubtful cases of compromise, but with a state of facts where parties surrender their legal remedies and place themselves at a disadvantage if the other party is allowed to retreat from his representations and deny their effect. In such a case the law will interfere on their behalf, though the remedy may not be always precisely the same.

The conduct of the parties is to be regarded.

In *Kally Nauth Shaw* v. *Rajeeblochun Mozoomdar*,[1] the plaintiff alleged that he was induced to compromise a suit which he had commenced, upon the terms that, as soon as the stock-in-trade at certain *kôtees* could be sold and an account be prepared, his share should be paid to him. Upon the faith of this agreement, he allowed his suit to be dismissed, but the defendants fraudulently refused to carry out the conditions of the compromise, and neglected to furnish the plaintiff with accounts, although the rice had been sold. Sir Barnes Peacock, C. J., observed: "It appears to me that the fact of the consideration of this agreement being the consent of the plaintiff to the compromise of a suit, and to a decree being passed against him, is no bar (if he can prove his case) to his maintaining a suit to compel the defendants to perform the agreement upon the basis of which the decree was obtained."

In *Gholaub Koonwurree* v. *Eshur Chunday*[2] the respondents, on attaining their majority, compromised a claim made upon them in respect of certain bonds given during their minority by their executor and guardian. After his death they sought to dispute their liability. Their Lordships of the Privy Council remarked: "It appears impossible to permit the respondents after the death of their guardian now to dispute their liability for payment of the debt which they had thus deliberately undertaken to pay."

Abandonment of compromise.

It is obvious, however, that if a compromise be abandoned, and the parties proceed with the trial, it cannot afterwards be enforced. So where the parties were at issue as to whether the defendant had sold certain land to the plaintiff, and a deed of compromise was entered into by which the defendant agreed to give the plaintiff some share in the land but afterwards withdrew, and contested

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[1] 2 Ind. Jur., N. S., 343 [1867]. *See* the same case upon an interlocutory application at p. 122, where the matter was argued as one of res judicata. *See* also *Juggobundo Chatterjee* v. *Watson & Co.*, 2 Bourke, 182 [1865].

[2] 8 M. I. A., 447; 2 W. R. (P. C.), 47 [1861].

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the whole case on the merits, it was held that he could not afterwards rely on the compromise, after having run his chance of obtaining a decree.[1]

Waiver. In all cases the intention and conduct of the parties must be looked to to see if they have insisted upon or waived their rights. Where a creditor filed a petition of satisfaction on consideration of his debtor withdrawing an appeal then pending, but the appeal was carried to a hearing, it was held that the creditor was not estopped from suing out execution.[2]

In *Shivalingaya* v. *Nagalingaya*[3] a previous suit between the parties had been compromised and a decree made accordingly. The parties then brought separate suits against the official representative of the estate. The plaintiff failed to prove his title, but the defendant succeeded in obtaining possession of the property. In his suit the plaintiff neglected to produce the compromise and the decree passed thereon. It was held that a subsequent suit in terms of the compromise was barred. So in *Janki Ammal* v. *Kamalathammal*,[4] the plaintiff having in a previous suit failed to establish her right of inheritance was held estopped from setting up a family agreement.

"The truth is a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end, and it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments and were to allow questions that were really involved in the action to be fought over again in a subsequent action.[5]"

Agreements in supersession of decrees when sanctioned by the Court. A subject closely connected with the foregoing discussion has given rise to much confusion and difference of opinion in this country. Where after a decree has been made the parties elect to come to an arrangement varying the ordinary course of execution, the question is whether the decree is to be treated as having been superseded so as to preclude the decree-holder from enforcing it. Cases frequently arise where a decree is by agreement altered as to the mode of payment or the interest payable, and in some instances

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[1] *Man Gobind Doss* v. *Jankee Ram Mohunt*, W. R., 211 [1864].

[2] *Dwarkanath Sarma* v. *Unnoda Soonduree*, 5 W. R. (Misc.), 30 [1866].

[3] I. L. R., 4 Bom., 247 [1878].

[4] 7 Mad. H. C., 263 [1873].

[5] *In re South American & Mexican Co.*, L. R., '95., 1 Ch., p. 50.

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such decrees have been acted upon by the parties and recognised by the Courts, so as to enlarge the period of limitation. At Allahabad the rule has been said to be that if the parties shew an intention to create new rights enforceable by suit in supersession of those acquired by and declared in the decree, they cannot afterwards enforce the decree. In Calcutta, however, it has been held that where such a contract is sanctioned by the Court, no party who has taken the benefit of the contract can afterwards resile from it, the rule of estopped by conduct being applicable to such cases.

Principle.

Their Lordships of the Privy Council have decided in general terms that where a Court has general jurisdiction over the subject-matter of a claim, the parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiae*.

Pisani v. Attorney-General of Gibraltar [1874].

In *Pisani* v. *Attorney-General of Gibraltar* [1] the respondent had filed an information in the Supreme Court of Gibraltar claiming certain lands as having escheated to the Crown. The defendants were the appellant who claimed under a conveyance from Miss Porro, another person who asserted that the appellant held the lands as trustee for him, and certain persons (some of whom were infants) claiming under a will of Miss Porro made in the year 1858. The original information prayed to have the conveyance declared void and for a decree that Miss Porro died without heirs and intestate, the Attorney-General alleging that the will of 1858 was revoked by a subsequent will of 1868 which disposed of personalty only, the persons interested in which were not before the Court. The Attorney-General having failed to prove an escheat, upon his motion, and by consent of all the parties, the information was irregularly amended so as to give the Court power to declare the rights of the defendants *inter se*. The Attorney-General then succeeded in shewing that the will of 1868 was obtained by undue influence, and did not therefore revoke the former will which was held to be valid, and that the conveyance to Pisani was void, he as an attorney being incapable of purchasing from his client. The will of 1858 being thus established, Pisani on appeal to the Privy Council contended that there was in fact no agreement

[1] L. R., 4 P. C., 516 [1874].

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that the information should be amended so as to have the rights of the defendants declared. The Attorney-General urged a preliminary objection that no appeal lay, the decree being like the award of an arbitrator, and the parties having by their consent waived the right to appeal.

Agreements contra cursus curiae.

Their Lordships held that Pisani, knowing that some of the parties were infants, could not afterwards object that his consent did not bind him, and upon the objection that the appeal was incompetent, observed: "Their Lordships would be most unwilling to uphold the agreement at all if this were to be the effect of it, because, in their opinion, such a result would be opposed to the intention of the parties. They clearly meant to keep themselves *in curiâ*, and the Judge clearly so understood them. It is plain also that the parties and the Judge thought that an appeal was open. It is true there was a deviation from the *cursus curiae*, but the Court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every-day occurrence; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal."

Sadasiva Pillai *v.* Ramlinga Pillai [1875].

This decision was expressly approved by the Judicial Committee in *Sadasiva Pillai* v. *Ramalinga Pillai*,[1] where the general principle above cited was laid down. There the appellant had obtained a decree in 1859 for certain property with mesne profits for the year 1858, but he did not claim mesne profits for the subsequent years, and the decree was silent as to the mesne profits which were accruing from and after the institution of the suit. An appeal having been preferred by the defendant, execution was from time to time stayed, upon the defendant executing security bonds, pursuant to orders of the Court, undertaking to satisfy the decree and to pay the mesne profits accruing during the six years the plaintiff remained out of possession. The decree was confirmed on appeal, and the plaintiff applied for execution in respect of the *interim*

[1] 15 B. L. R., 383; 24 W. R., 193; L. R., 2 I. A., 219 [1875].

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mesne profits. The defendant contended that his liability to account for the *interim* profits was not "a question relating to the execution of the decree" within the meaning of section 11 of Act XXIII of 1861, but that the mesne profits claimed should be made the subject of a separate suit, and the Madras Court so held. Their Lordships of the Privy Council proceed upon the broad ground of estoppel[1] observing: "Upon the whole, their Lordships are of opinion that the respondent, by the proceedings in question, did come under an obligation to account in this suit for the subsequent mesne profits of the appellant's land. They conceive that this liability made the accounting 'a question relating to the execution of the decree' within the meaning of the latter clause of that section. But even if it did not, they think that, upon the ordinary principles of estoppel, the respondent cannot now be heard to say that the mesne profits in question are not payable under the decree...The Court here had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case, therefore, seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani* v. *The Attorney-General of Gibraltar*,[2] in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiae*."

Calcutta.

The Calcutta High Court in *Sheo Golam Lall* v. *Beni Prosad*[3] followed the above general rule. In that case the judgment-debtor entered into an arrangement with the decree-holder that, if he did not pay off the debt by a certain date, he would pay interest on the whole decretal money at 2 per cent. An order was made to that effect, and the execution case was struck off. Similar arrangements were made from time to time over a period of four years

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[1] The ground is indicated in their Lordships' judgment. "The effect of each document seems to be an undertaking on the part of the person executing it, and that not by a mere written agreement between the parties, but by an act of the Court, that in consideration of his being allowed to remain in possession pending the appeal, he will, if the appeal goes against him, account in that suit, and before that Court," for the mesne profits of the year in question.' 15 B. L. R., p. 401.

[2] L. R., 5 P. C., 516.

[3] I. L. R., 5 Cal., 27 [1879]. See *Thakoor Dyal Singh* v. *Sarju Pershad Misser*, I. L. R., 20 Cal., 22 [1892]; *Ram Doyal Banerjee* v. *Ram Hari Pal*, I. L. R., 20 Cal., 32.

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whenever execution was applied for. On the last occasion the sale was ordered to be postponed for six months, the debtor agreeing to pay the sum admitted to be due with interest at 24 per cent. per annum, and the case was taken off the file. The Court treated the attachment as subsisting and declared the decree-holder entitled to execute his decree in terms of the last-mentioned agreement, observing: "As to the main question, whether the decree-holder is or is not entitled to proceed upon the terms of the agreement of the 15th May 1877, we think that it is only necessary to refer to the case of *Sadasiva Pillai* v. *Ramalinga Pillai*.[1]...Where parties by mutual agreement make certain terms, and inform the Court of them, and the Court sanctions the arrangement and makes an order in conformity with it, either party, who has had the benefit of the arrangement and order, is not at liberty to resile from the agreement. The question, whether such an agreement does or does not violate the rule that a Court cannot add to its decree, becomes under the circumstances one which the Court will not enter into; the party who seeks to raise such question being estopped by his own conduct, and the action of the Court taken thereunder."

Allahada

The Allahabad Court have refused to apply the principle of estoppel, holding that where an agreement adding to or varying a decree has been made *in facie curiae* for consideration and recognised by the Court, such agreement can only be enforced by a separate suit, the agreement operating by novation to extinguish the rights of the parties under the original decree.

In *Stowell* v. *Billings*[2] the decree-holder agreed to accept payment by instalments, and the judgment-debtor put in a petition acknowledging the decree-holder's right to execution of the original decree. The compromise was ratified by the execution Court, and the case struck off the file. More than three years afterwards the decree-holder took proceedings to enforce his decree. The Court held, following the Full Bench decision of the Calcutta High Court in *Krishna Kamal Singh* v. *Hira Sudan*,[3] that a compromise, even though recognised by the Court executing the decree, could not enlarge the limitation.

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[1] 15 B. L. R., 383; 24 W. R., 193; L. R., 2 I. A., 219 [1875].

[2] I. L. R., 1 All., 350 [1877].

[3] 4 B. L. R. (F. B.), 101 [1869]. *See* also the case of *Abbas Imam*, H. C. R., N.-W. P. (1873), 100.

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Debi Rai v. Gokal Prasad [1881].

In 1881 the Full Bench of that Court in *Debi Rai* v. *Gokal Prasad*[1] observed upon the previous authorities. In that case the decree-holder obtained a decree in 1863 which he continued to execute down to 1870. In 1871 it was arranged by deed that the judgment-debtor should pay the sum due in two instalments in 1872 and 1873, and that in case of default the decree-holder should be at liberty to realise the whole sum. The agreement of 1871 was for many years executed as a decree without objection being taken by the judgment-debtor, but in 1878 the latter contended that the agreement had superseded the decree which became no longer capable of execution. The Full Bench (Oldfield, J., dissenting) were of opinion that the agreement amounted to an abandonment of the decree which became incapable of execution, not only by the law of limitation, but by the agreement which superseded it. Their Lordships appear to distinguish the Privy Council case as one decided under "special circumstances" which took the plaintiff's claim out of the "general rule," because there the terms of the original decree were not altered or varied by the defendant laying himself under the obligation to account. The judgments do not all proceed upon precisely the same ground, but such appears to be their general effect. The dissenting member of the Court however rested his opinion upon the authority of the Privy Council and Calcutta cases, and observed: "Even if it could be held that the agreement should more properly be enforced by suit and not in execution of the decree, the judgment-debtor must be held estopped from raising this plea, since he entered into the agreement and took the benefit of it, and has without objection allowed it to be enforced under the decree since 1873."

Novation.

A Division Bench of the Court in 1884 followed the Full Bench ruling. In *Ramlakhan Rai* v. *Bakhtaur Rai*[2] the parties entered into a *kistbandi* compromise whereby, in lieu of a portion of the decretal money, the decree-holder was placed in possession of certain property, the balance of the decretal money being payable by instalments, in default of payment of any one of which the whole amount was to become realizable by execution of the original decree. The Court held that the decree-holder could not be allowed to treat the compromise as an instalment decree, the

[1] I. L. R., 3 All., 585 [1881].

[2] I. L. R., 6 All., 623 [1884].

original decree being extinguished by the substitution of a new contract."

Where no intention to create new rights.

In two cases the Madras and Allahabad Courts have held that a compromise which did not supersede the decree was no bar to the original decree being enforced. In *Darbha Venkamma* v. *Rama Subbarayadu*,[1] the Full Bench of the Madras High Court held that as no intention was shewn in the parties to create new rights enforceable by suit in supersession of those declared by the decree, a suit on a "postpone petition" could not be maintained. What the parties to that petition desired was that the Court should regard the amount adjudged by the decree as payable by instalments, and that process of execution in case of default should be issued in the manner provided. And in *Ganga* v. *Murli Dhar*[2] a Division Bench at Allahabad held that a petition presented to the execution Court stating that the decree had been in part satisfied, that a portion of the balance was to be set-off against a debt due to the judgment-debtor which was to be realised by the decree-holder, and that the remainder was to be paid by instalments, upon default of payment of which the decree-holder should be at liberty to execute the decree for the whole sum, did not amount to a supersession of the original decree. The case was, therefore, distinguishable from the Full Bench ruling in *Debi Rai* v. *Gokal Prasad*.[3]

Provisions of the Civil Procedure Code.

Upon the above ruling therefore the question would appear not to be free from difficulty. The matter, it is apprehended, becomes clearer when certain sections of the Code of Civil Procedure are considered. Section 257A provides that agreements to give time for the satisfaction of a judgment debt are void unless made for a reasonable consideration and with the sanction of the Court, and agreements providing for the payment of a sum in excess of the sum due under the decree are void, unless made with the like sanction. Section 258 requires payments made out of Court or payments made under the foregoing section to be certified to the Court; and section 244 enacts that, in addition to questions relating to mesne profits, any other questions arising between the parties to the suit or their representatives and relating to the execution, discharge or

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[1] I. L. R., 1 Mad., 387 [1878].
[2] I. L. R., 4 All., 240 [1882].
[3] I. L. R., 3 All., 585 [1881].

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satisfaction of the decree or to the stay of execution thereof, are to be determined by the order of the Court executing the decree and not by a separate suit.

Two elements then are necessary to the validity of such compromises, consideration, and the sanction of the Court, and if the terms of section 244 are to be liberally construed so as to prevent litigation,[1] the more beneficial rule would appear to be that where parties fully intend to keep themselves *in curiâ*, they should, by their conduct, be held estopped from questioning an agreement entered into by them through an act of the Court and for reasonable consideration, and that such agreements should be enforced in execution.

Judgment-debtor not estopped by conduct in execution-proceedings.

In Bombay it has been held that proceedings in execution are *in invitum* as against the judgment-debtor,[2] who is not estopped by any act or omission on his part from afterwards asserting his title. In *Gurupadapa* v. *Irapa*,[3] the defendants omitted to set up their title to the property, and even accepted the surplus sale-proceeds after the execution-sale. The Court observed that it was not suggested "that the defendants took any part in the execution-proceedings, or so stood by as to induce bidders to suppose they claimed no interest other than as representatives of the original judgment-debtor, or that their silence misled the bidders at the sale; and as to the defendants having received the residue of the purchase-money from the Nazir after satisfaction of the judgment debt, that was after the purchase was completed."

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[1] *See* the observations of the Judicial Committee in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*, L. R., 19 I. A., 166 (169) [1892]

[2] *Vasanji Haribhai* v. *Lalla Akku*, I. L. R., 9 Bom., 285 (288) [1885].

[3] I. L. R., 14 Bom., 558 [1890].

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PART II.

ESTOPPEL BY JUDGMENT.

CHAPTER I.

RES JUDICATA.

Res Judicata—Division of the subject—Indian Enactments—Rule in this country framed with reference to the English cases—Leading cases—*Gregory* v. *Molesworth* [1747]—The decree must be in effect a determination of the points between the parties—There cannot be two contradictory judgments upon the same record—*Duchess of Kingston's case* [1776]—The sentence of an Ecclesiastical Court in a suit of jactitation of marriage held not conclusive as to the validity of the marriage in a prosecution subsequently preferred against one of the parties for bigamy—Leading principles of res judicata enunciated—The sentence operated as evidence only—Conclusive judgments may be reopened on the ground of fraud—*Outram* v. *Morewood* [1803]—The judgment is final only for its own proper purpose and object, and between the parties and their privies—*Barrs* v. *Jackson* [1845]—Grounds of the decision in the Court of Appeal—Opinion of Knight Bruce, V. C.—Exposition of the doctrines of the Civil Law—The objects and purposes of the two suits are to be looked to—*Brunsden* v. *Humphrey* [1884]—The difficulty is how far the causes of action in the two suits are in substance identical—The application of the rule depends upon matter of substance—"Cause of action" defined by the Judicial Committee—It refers to the *media* upon which the plaintiff prays judgment—Was the same right infringed in substance?—"Cause of action" illustrated—Difficulties of the subject.

Res judicata.

THE subject of Estoppel by judgment or Res Judicata has now to be considered. The historical aspects of this branch of estoppel were noticed in the Introductory Chapter, where also its position in the field of Jurisprudence was shortly defined.[1] The subject itself will be examined with reference to—(*a*) Forum or the competence of the Court; (*b*) Parties and their Representatives; (*c*) Matters in issue; (*d*) Matters which ought to have been made ground for defence or attack in a former suit; (*e*) Final decision; (*f*) Judgments *in rem*, domestic and foreign; (*g*) Foreign Judgments *in personam*.

Division of the subject.

Before examining these topics in detail, it is advisable to present the main features of Res Judicata by a summary of some of the

Indian Enactments.

[1] *See* pp. 5—7, 8—13, and the Summary of the subject, at pp. 21—26, *supra*.

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leading cases in England. The law of Estoppel by Judgment in this country is embodied in section 13 of the Code of Civil Procedure,[1] a provision apparently simple in itself, but overlaid with a large number of conflicting decisions. As pointed out by the Judicial Committee in *Soorjomonee Dayee* v. *Suddanund Mohapatter*,[2] the corresponding clause in the Code of 1859[3] by no means prevented the operation of the general law relating to Res Judicata founded on the principle *nemo debet bis vexari pro eâdem causâ*. "That law," said their Lordships, "has been laid down by a series of cases in this country with which the profession is familiar."

Rule in this country founded upon the English cases.

The re-enactment of the rule of Res Judicata in the Code of 1877 appears to have been made with the intention of embodying in sections 12 and 13 of that Code the law then in force in India founded upon the English decisions instead of the imperfect provision in section 2 of Act VIII of 1859.[4] In a recent case[5] the Judicial Committee of the Privy Council say: "*Neither should*

[1] Act XIV of 1882: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they, or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

"*Explanation I.* — The matter above referred to must, in the former suit, have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

"*Explanation II.* — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

"*Explanation III.*—Any relief claimed n the plaint, which is not expressely granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

"*Explanation IV.*—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

"*Explanation V.*—Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

"*Explanation VI.* — Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction."

[2] 12 B. L. R., 304 (315) [1873].

[3] Act VIII of 1859, s. 2. "The Civil Courts shall not take cognisance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim."

[4] *Misir Raghobardial's case*, I. L. R., 9 Calc., 439 (445) [1882].

[5] *Kameswar Pershad* v. *Rajkumari Ruttun Koer*, L. R., 19 I. A., 238; I. L. R., 20 Calc., 79 [1892].

it be lost sight of that the Act of 1877 *and the Act of* 1882 *were not introducing any new law, but were only putting into the form of a Code that which was the state of the law at the time. The state of the law at the time was, that persons should not be harassed by continuous litigation about the same subject-matter.*"

The principle of Res Judicata as remarked by West, J., in *Shridhar Vinayak* v. *Narayan Valad Babaji*[1] is "simple in its statement but presents considerable difficulty in its application;" and in view of the conflict which has taken place in the Indian Courts with regard to the fundamental principles of the subject, it may be useful to present in a short form the Leading Cases upon which the doctrine has been built up in England, more especially as these authorities have been very frequently referred to in this country; lastly, the expression "Cause of Action" will be defined and illustrated. By such a method of treatment it is apprehended the subject may most clearly be introduced.

Leading cases.

Cause of action.

In *Soorjomonee Dayee* v. *Suddanund Mohapatter*,[2] their Lordships of the Judicial Committee observed:—"The rule has probably never been better laid down than in a case—*Gregory* v. *Molesworth*[3]—in which Lord Hardwicke held that where a question was necessarily decided, in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other form, and that decision has been followed by a long course of decisions."

Gregory *v.* Molesworth [1747].

In *Gregory* v. *Molesworth*,[3] it was pleaded in answer to a bill in Chancery that a former decree had been signed and enrolled relating to the same matter. The former decree was made on a bill brought by the plaintiff's wife to have an account of her father's personal estate, and claiming a fifth share. The decree directed an account to be taken, and expressely directed that certain stock should be sold and a one-fifth share reserved for the defendant when he attained the age of twenty-one. Lord Chancellor Hardwicke observed:—"This is a very plain case, for it would be very

The decree must be in effect a determination of the points between the parties.

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[1] 11 Bom. H. C. R., 228 [1874]. See *Vithilinga Padayachi* v. *Vithilinga Mudali*, I. L. R., 15 Mad., 119 [1891], where the observations of Dr. Whitley Stokes (Anglo-Indian Codes, Vol. ii, 392) are cited: "The matter dealt with by section 13 is a subject of which the importance in a country inhabited by a litigious population is only equalled by the difficulty of dealing with it clearly, concisely, and accurately in a legislative enactment."

[2] 12 B. L. R., 304 (315) [1873].

[3] 3 Atkyns, 625 [1747].

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mischievous if a new bill was allowed to be brought by the plaintiff here. This is a plea of a former decree made in a cause relevant to the same matter with the present bill. The question will be first, whether the decree is a determination of the points between the parties. As to this it is improper for the Court to give a different judgment, because there would be two contradictory judgments appearing on the same records. . . This is as full a determination against the plaintiff, as if a determination on the point that the plaintiff is not entitled. . . I cannot presume that improper proofs were made in the former cause, but must take it for granted that proper ones were given, unless the enrolment of the decree was opened by a bill of review, and a plea to that bill disallowed; there the Court overrules the plea, and then the cause is opened again, and can properly come at it if error appears on the face of it, but as it stands now the plea must be allowed."

There cannot be two contradictory judgments upon the same record.

In the *Duchess of Kingston's case*[1] the House of Lords referred two questions for the opinion of the Judges:—*Firstly*, as to whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of a marriage[2] was conclusive evidence so as to prevent counsel for the Crown from proving the marriage in an indictment for polygamy; and *secondly*, as to whether, admitting such evidence to be conclusive upon such indictment, counsel for the Crown could be permitted to avoid the effect of such a sentence by proving it to have been obtained by fraud or collusion. The first question was answered in the negative, and the second in the affirmative.

Duchess of Kingston's case [1776]. The sentence of an Ecclesiastical Court in a suit of jactitation of marriage held not conclusive as to the validity of the marriage in a prosecution subsequently prefered against one of the parties for bigamy.

The unanimous opinion of the Judges was delivered by the Lord Chief Justice of the Court of Common Pleas, Sir William de Grey,[3] in a judgment which has become historical with reference to the subject of Res Judicata. "What has been said at the

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[1] 2 Sm. L. Ca., 9th ed., 812 [1776].

[2] "Of matrimonial causes," says Blackstone (Commn., Vol. iii, 93], "One of the first and principal is 1, *causa jactitationis matrimonii*; when one of the parties *boasts* or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the Spiritual Court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the Ecclesiastical Courts can give for this injury." Since the institution of the Divorce Court by the Matrimonial Causes Act of 1857 (20 and 21 Vict., c. 85, s. 6), these cases have been of very infrequent occurrence. See Browne and Powles on Divorce, 5th ed., 143, 144.

[3] Afterwards Lord Walsingham.

bar," remarked Sir William de Grey, "is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon facts found, although *evidence* against the parties and those claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, but not being applicable to the present subject, it is unnecessary to state them.

Leading principles of res judicata enunciated.

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: *first*, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another Court; *secondly*, that the judgment of a Court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within their jurisdiction, nor of any matter *incidentally* cognisable, nor of any matter to be *inferred* by argument from the judgment."

Relations between the Ecclesiastical and Temporal Courts.

The Chief Justice of the Common Pleas then proceeded to trace the relations between the Spiritual and the Temporal Courts and pointed out that where in civil causes the Temporal Courts found the question of marriage directly determined by the Ecclesiastical Courts they received the sentence, though not as a Plea, yet as *proof* of the fact; it being an authority accredited in a judicial proceeding by a Court of competent jurisdiction; and cited various examples in which the parties to the suits, or at least the parties against whom the evidence was recorded, were parties to the sentence and had acquiesced in it; or claimed under those who were parties and acquiesced. In matters of crime,

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however, the rule was different because the parties were not the same, and the Ecclesiastical Courts had no judicial cognisance in matters of crime. And even if a direct sentence upon the identical question in a matrimonial cause were to be admitted as evidence, (though such sentence against the marriage had not the force of a final decision that there was none,) yet a cause of jactitation was of a different nature, and the sentence there had only a negative and qualified effect, *viz.*, 'that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears,' thus allowing the marriage to be established by further proof in the same or any other cause.

The sentence operated as evidence only and not as conclusive proof.

"So that," observed Sir William de Grey, "admitting the sentence in its full extent and import, it only proves that it did not yet appear that they were married, and not that they were not married at all, and such sentence can be no proof of anything to be inferred by argument from it; and therefore it is not to be inferred that there was no marriage at any time or place, because the Court has not then sufficient evidence to prove a marriage at a particular time and place. That sentence and this judgment may well stand together, and both propositions be equally true: . . . But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet like all other acts of the highest judicial authority, it is impeachable from without: although it is not permitted to show that the Court was mistaken, it may be shewn that they were misled. Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal."

Conclusive judgments may be reopened on the ground of fraud.

Upon these considerations the Judges were of opinion that the sentence of the Ecclesiastical Court was not conclusive evidence, and that, even if it were conclusive, its effect might be avoided by proving fraud or collusion.

Outram *v.* Morewood [1803].

Some years later the case of *Outram* v. *Morewood*[1] was decided in the Queen's Bench by Lord Ellenborough, C. J. The plaintiff brought an action of trespass against the defendant Morewood and his wife Ellen for carrying away coals out of his coal

[1] 3 East., 346 [1803].

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mine, to which the defendants pleaded a title derived from one Zouch to the defendant Ellen, (the defendant Morewood claiming through his wife,) and averred that the coals in question were under the lands of the former owner Zouch. To this plea the plaintiff replied, and relied by way of estoppel upon a former verdict obtained by him in an action of trespass brought by him against Ellen, she being then sole; to which the wife pleaded, and derived title in the same manner as now done by her and her husband, practically raising the same defence. In the former suit an issue was taken and found for the plaintiff and against the wife upon the point whether the coal mines claimed by the plaintiff were part and parcel of what passed under Zouch's bargain and sale to the persons under whom the wife claimed. The question, therefore, arose whether the defendants, the husband and wife, were estopped by the former verdict and judgment from averring contrary to the title there found against the wife.

Facts.

"The operation and effect of this finding," said the Chief Justice, "if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring contrary of what was then so found, the husband in respect of his *privity* either in estate or in law would be equally bound according to what is said in Co. Lit. 352*a*[1] . . . A recovery in any one suit upon issue joined on matter of title is equally conclusive upon the subject-matter of such title: and a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. . . And it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law,

Privy estopped by former verdict and judgment.

The judgment is final only for its own proper purpose and object.

[1] "Privies in estate, as the lessee, feoffee, etc., privies in law, as the lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act in law or in the post, shall be bound by and take advantage of estoppels." *See* also Brook Tit. Estoppel, pl. 15; Bro. Estate, 158, 2 E., 4 (17).

has been, on such issue joined, solemnly found against them. . . . A judgment, therefore, in each species of action is final only for its own proper purpose and object and no further . . . . Each species of judgment is equally conclusive upon its own subject-matter by way of bar to future litigation for the thing thereby decided."

Principle of res judicata stated with reference to the immediate subject-matter of the decision.

After examining the authorities[1] the Chief Justice came to the conclusion that an allegation on record, upon which issue has been once taken and found, is between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found, and observed in conclusion : "None of the cases, therefore, cited on the part of the plaintiff, negative the conclusiveness of a verdict found on any precise point once put in issue between the same parties or their privies. The cases adverted to by Lord Holt[2] together with the other authorities on the subject of protestation and estoppel cited from Bro. Abr. Protestation, pl. 9 ; Fitzherbert Estoppel, pl. 20, are, in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive, that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party, from averring that the coal mines now in question are parcel of the coal mines bargained and sold by Sir John Zouch, and consequently that the plaintiff ought to recover."

Barrs *v.* Jackson [1842-1845]

The principles of Estoppel by Judgment were enunciated with great force and lucidity by Vice-Chancellor Knight Bruce in the case of *Barrs v. Jackson*,[3] and his opinion, though reversed by the Court of Appeal upon the precise point determined, has always been regarded as the foundation of the modern rules of Res Judicata.

Facts.

One Harriet Smith having died unmarried and intestate in 1839, an administration suit was instituted in the Prerogative Court of Canterbury, in which suit Jackson claimed as second cousin to Miss Smith and her next of kin, and Mrs. Barrs claimed as the niece and next of kin of Miss Smith. In 1840 the Court decided

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[1] See *Ferrer's case*, 6 Co. Rep., 7 ; Cro. Eliz., 668 [1598] ; *Incledon* v. *Burgess*, 1 Show., 27 ; Comb., 166 ; Carthew, 65 [1688].

[2] *Incledon* v. *Burgess*, *ubi supra*.

[3] 1 Y. & C., 585 ; S. C., 1 Phillips, 582 [1842—1845].

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in favour of Jackson, and decreed letters of administration to him as the lawful second cousin and next of kin of the deceased. In 1841 Mrs. Barrs and her husband filed a bill in Chancery claiming as next of kin the residuary estate of the intestate.

The defendant Jackson relied on the proceedings in the Ecclesiastical Court, and contended that the sole question in issue in the present suit had already been decided in his favour, the former decision being conclusive. The Vice-Chancellor did not consider the sentence of the Prerogative Court conclusive, and directed an issue to be tried whether, at the time of the death of Miss Smith, the plaintiff Mrs. Barrs was her sole next of kin.

Grounds of the decision in the Court of Appeal.

Lord Lyndhurst, L. C., however, in the Court of Appeal, upon the authority of a case of *Bouchier* v. *Taylor*,[1] decided by the House of Lords in 1776, in which the circumstances were exactly similar, supported by the previous decisions of Lord Hardwicke in *Thomas* v. *Ketteriche*[2] and of Lord Holt in *Blackham's case*,[3] and distinguishing the *Duchess of Kingston's case*,[4] held that the sentence of the Ecclesiastical Court in a suit for administration, upon the question as to which of the parties was next of kin to an intestate, was conclusive upon that question in a suit in another Court between the same parties for distribution.

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[1] 4 B. P.C., 708; Hargrave's Law Tracts, 473 [1776]. The decision in *Bouchier* v. *Taylor*, which took place a month previous to the decision of the Judges in the *Duchess of Kingston's case*, rested upon the ground that although the two suits were for different objects, one for administration and the other for distribution, yet the *fact* had been in issue between the parties and was finally decided between them in a Court of concurrent jurisdiction. This is also the ground upon which the decision of the Court of Appeal in *Barrs* v. *Jackson* proceeds.

[2] 1 Ves., Sr., 333 [1749], where Lord Hardwicke observed: "It follows as a matter of course that this Court (the Court of Chancery) also must be bound, otherwise the two Courts would come upon the same facts and circumstances to contradictory conclusions;" since a suit for distribution might have been instituted in the Ecclesiastical Court, both Courts having concurrent jurisdiction with respect to distribution.

[3] 1 Salk., 291 [1711]. The plaintiff stated that he had married Jane Blackham shortly before her death, and claimed her goods. The defendant set up that administration had been granted to him, and urged that it could never have been granted except on the supposition that no such marriage had ever taken place. Lord Holt held that the question had never been put in issue before the Ecclesiastical Court, and that its judgment was not conclusive as to matters collaterally in issue or merely to be inferred by argument.

[4] 2 Sm L. Ca., 9th Ed., 812; 20 How's State Trials [1776], upon the ground that there the two proceedings were between different parties, and the decision of a question raised between Mr. Harvey and the Duchess of Kingston could not be conclusive in another proceeding between the Duchess of Kingston and the Crown.

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Knight Bruce, V. C.

The Vice-Chancellor, however, had considered the cases of *Bouchier* v. *Taylor*[1] and *Thomas* v. *Ketteriche*[2] distinguisable and preferred to "incur the charge of differing from the high and venerable authority of Lord Hardwicke and Lord Mansfield"; holding that, the only question of fact being whether Robert James Smith, the father of Mrs. Barrs, was legitimate or not, an enquiry was proper—"the present state of the evidence being in a condition of considerable obscurity and doubt, it being admitted that the plaintiffs had more evidence than was before the Spiritual Court. The Vice-Chancellor's exposition of the principles of the Civil Law upon the subject of Res Judicata, connecting those principles with the previous decisions of the English Courts, has always been considered unequalled for its lucidity and soundness. The passages are rendered into English in the notes.

Exposition of the doctrines of the Civil Law.

"With the rule of the Civil Law," said Knight Bruce, V. C., "rightly understood, which, in the language of Ulpian says, '*Res judicata pro veritate accipitur*,'[3] the Law of England generally agrees. The sound reason of the rule can scarcely be better expressed than it is by Paulus, in the Digest, thus: '*Singulis controversiis singulas actiones, unamque judicati finem sufficere, probabili ratione placuit; ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem: maxime si diversa pronunciarentur.*'[4]

"Other passages in the same division of the Digest are to this effect:—Thus Ulpian says: '*Et generaliter (ut Julianus definit) exceptio rei judicatae obstat, quoties inter easdem personas eadem quaestio revocatur, vel alio genere judicii.*'[5]

"Paulus says: '*Cum quaeritur, hæc exceptio noceat necne? inspiciendum est an idem corpus sit.*[6] . . . . *Et an eadem causa petendi, et eadem conditio personarum; quæ nisi omnia concurrunt,*

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[1] 4 B. P. C., 708; Hargrave's Law Tracts, 473 [1776].

[2] 1 Ves. Sr., 333 [1749].

[3] "A matter once decided is to be taken as true."

[4] Dig. Lib. 44, Tit. 2, s. 6. "That for each matter in controversy there should be one cause of action, and that there should be an end of litigation, is only reasonable; otherwise, if there were a multiplicity of suits very great difficulties would arise, especially if the decisions happened to be contradictory."

[5] Section 7: "Generally speaking (as laid down by Julianus), the plea of res judicata is available whenever the same question is raised between the same parties, even in suits of a different nature.

[6] Section 12: "If the question be asked, 'does this plea work injustice or not,' it is necessary to see if the matter is the same."

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alia res est."[1] And again: '*Si quis interdicto egerit de possessione, postea in rem agens non repellitur per exceptionem; quoniam in interdicto possessio, in actio proprietas vertitur.*"[2]

And Neratius, '*Cum de hoc, an eadem res est, quaeritur, haec spectanda sunt: personae; id ipsum de quo agitur: causa proxima actionis: nec jam interest, quâ ratione quis eam causam actionis competere sibi existimâsset; perinde ac si quis, postea quam contra eum judicatum esset, nova instrumenta causae suae repperisset.*"[3]

Voet, in his commentary on this title, says, '*Non aliter tamen huic exceptioni locus est, quam si lis terminata denuo moveatur inter easdem personas, de eâdem, etc., et ex eadem petendi causâ; sic ut, uno ex his tribus deficiente, cesset. Eadem res intelligitur quotiens apud judicem posteriorem id quaeritur quod apud priorem quaesitum est. . . Eadem petendi causa est etiam, licet non eâdem agatur actione, sed alio judicii genere eadem quaestio ventiletur; cum eandem causam non tam actio faciat, quam potius origo petitionis, etc.*"[4]

"Vinnius, in a note to the 13th title of the 4th book of the Institutes, upon the words '*per exceptionem rei judicatae*,' says, '*Quae ita agenti obstat, si eadem quaestio inter eosdem revocetur, id est, si omnia sint eadem, idem corpus, eadam quantitas, idem jus, eadem causa petendi, eadem conditio personarum;*'[5] and other commentators express themselves to a similar effect.

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[1] Section 14: "And whether the relief claimed is the same, and the position which the parties occupy the same. Unless all these are identical the matter is of a different nature."

[2] *Ib.*: "If any one claim possession by means of an interdict, and afterwards go against the thing by action, he is not estopped by the plea, for in the interdict the bare question of possession is adjudicated upon, whereas in the action it is the proprietorship of the thing that is being tried."

[3] Section 27: "If the question be asked whether the matter in issue is the same, the following matters have to be looked to: parties; the subject-matter of the suit; and the cause of action. For it makes no difference what reasons a man may have for thinking he has a cause of action, as for instance whether, after there has been a binding decision against him, he has found new material for re-litigating his claim."

[4] "This plea is allowed when a suit finally decided is sought to be re-opened between the same parties concerning the same subject-matter and upon the same cause of action. When one of these three requisites is wanting the plea fails. The subject-matter is the same when the same issue is sought to be tried which has been already decided. The cause of action will be the same, although the form of action may not be identical, but another method of procedure may have been adopted for the trial of the same question; for it is not so much the frame of the suit as the right to sue which creates the cause of action."

[5] "This plea is available as an estoppel if the same question substantially is revived between the same parties, that is to say, if the subject-matter, the quantity, the right, the cause of action, and the character the parties occupy are all the same as before."

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The objects and purposes of the two suits are to be looked to.

The Vice-Chancellor then continued: "It may be doubted, I think reasonably, whether having regard to the different objects and purposes of the two suits, if the present point were to be tried by the language of the Digest, or of the principal commentators upon it (including Voet), the illegitimacy of Robert James Smith could be held res judicata, so as to expose the demand in the present suit to that exception. The law of England must, however, govern in this case;" and proceeded to examine the authorities above cited remarking:—

A judgment is final only for its proper purpose and object.

"If the law as derived from these and other authentic sources, is, as I apprehend it to be, that generally the judgment, neither of a concurrent nor of an exclusive jurisdiction, is (whether receivable or not receivable) conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment; and that a judgment is final only for its proper purpose and object; it may be thought difficult to say why the sentence in the present case ought, upon the present question, to be deemed conclusive."

Commentary upon Outram v. Morewood. The direct object of the previous decision is not to be defeated.

The learned Judge upon the case of *Outram* v. *Morewood*[1] observed: "Lord Ellenborough certainly decided most accurately with reference to the pleading in that action at Common Law, that an allegation on record, upon which issue has been once taken and found, is, between the parties taking it, conclusive according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found. . . But it is, I think, to be collected, that the rule against reagitating matter adjudicated is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either of them may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears

[1] 3 East, 346 [1803].

to me, generally speaking, to be consistent with reason and convenience and not opposed to authority."

Difficulties of the subject.

These observations are of great value in dealing with the practical difficulties which arise in the application of the rules of res judicata, and the observations of Bowen, L. J., in the recent case of *Brunsden* v. *Humphrey*,[1] may be cited as shewing what these difficulties are.

Brunsden v. Humphrey [1884].

The plaintiff brought an action in the County Court and recovered damages from the defendant for injury to his cab occasioned by the negligence of the defendant's servant. The plaintiff afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by him through the same negligence. The jury found for the plaintiff, with £350 damages, for which judgment was entered. Upon a rule for a new trial, Pollock, B., and Lopes, J., held that the judgment in the first action was a bar to the subsequent proceedings, inasmuch as damages for the personal injuries might have been claimed and recovered in the first action. The Court of Appeal however (Brett, M. R., and Bowen, L. J., Lord Coleridge, C. J., dissenting) held that damage to goods and injury to person, although they may have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to separate causes of action, and that the action in the High Court was therefore maintainable.

The difficulty is how far the *causes* in the two suits are in substance identical. The application of the rule depends upon matter of substance.

"The rule of the ancient Common Law," observed Bowen, L. J.,[2] "is that where one is barred in any action real or personal by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing forever. 'It has been well said' (says Lord Coke in a note to *Ferrer's case*)[3] '*interest republicae ut sit finis litium*, otherwise,' says Lord Coke, 'great oppression might be done under colour and pretence of law' (*see* also *Sparry's case*[4]; *Higgens's case*[5]; Year Book 12, Edward IV, p. 13, 10). . . The principle is frequently stated in

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[1] L. R., 11 Q. B. D., 712; S. C., L. R., 14 Q. B. D., 141 [1884]. See *Serrao* v. *Noel*, L. R., 15 Q. B. D., 549 [1885]; *MacDougall* v. *Knight*, L. R., 25 Q. B. D., 1 (7) [1890].

[2] L. R., 14 Q. B. D., 141 (146,147).

[3] 6 Coke, 9*a*.

[4] 5 Coke, 61*a*.

[5] 6 Coke, 45*a*; *Hudson* v. *Lee*, 4 Coke, 43*a*; *Bird* v. *Randall*, 3 Burr., 1345 [1762]; and *Phillips* v. *Berryman*, 3 Doug. 287 [1783], where also referred to.

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the form of another legal proverb. *Nemo debet bis vexari pro eâdem causâ.* It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. *The difficulty in each case arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit.* 'The principal consideration,' says DeGrey, C. J., in *Hitchin* v. *Campbell*,[1] 'is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case.' 'And one great criterion,' he adds, 'of this identity, is that the same evidence will maintain both actions.' See *per* Lord Eldon in *Martin* v. *Kennedy*.[2] 'The question,' says Grose, J., in *Seddon* v. *Tutop*,[3] 'is not whether the sum demanded *might have been* recovered in the former action, the only enquiry is whether the same cause of action *has been* litigated and *considered* in the former action.' Accordingly 'though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made to give evidence upon some of the claims, they might have been recovered in another action.' *Thorpe* v. *Cooper*.[4] *It is evident, therefore, that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance.*"

One criterion whether the same evidence will maintain both actions.

Cause of action defined by the Judicial Committee.

The expression "Cause of Action" has been frequently defined by the Judicial Committee of the Privy Council, with reference both to the Code of 1859 and the subsequent enactments. In *Soorjomonee Dayee* v. *Suddanund Mohapatter*,[5] their Lordships observed that the expression is to be construed with reference rather to the substance than to the form of the action, so as not to prevent the operation of the general rule founded on the maxim—'*Nemo debet bis vexari ;*' and in *Krishna Behari Roy* v. *Brojeswari Chowdhranee*,[6] the Judicial Committee remarked with reference to section 2 of Act VIII of 1859:—"The expression 'cause of action' cannot be taken in its literal and most restricted sense, but however that may be, by the general law where a

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[1] 2 W. Bl., 827 [1772].
[2] 2 Bos. & Pul., 71 [1800].
[3] 6 T. R., 607 1796].
[4] 5 Bing., 129 [1828].
[5] 12 B. L. R., 315 [1873].
[6] L. R., 2 I. A., 285 [1875].

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material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the status of one of them in relation to the other, it cannot be tried again in another suit between them." A few years later in *Rajah of Pittapur* v. *Sri Rajah Row Buchi Sittaya Garu*,[1] a case under Act X of 1877, their Lordships quoted the above remarks, observing—"That Act (the Code of 1859) is not so extensive as the Act of 1877, because it merely declares that a second trial shall not take place upon a cause of action which has already been decided." And in *Rajah of Pittapur* v. *Sri Rajah Venkata Mahipati Surya*,[2] with reference to section 7 of Act VIII of 1859[3] which corresponds with section 43 of the present Code, Sir Barnes Peacock observed: "That section does not say that every suit shall include every cause of action or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action,'—meaning the cause of action for which the suit is brought;"—and cited with approval the rule laid down in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*.[4] "Their Lordships think that the correct test is whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit." And the above remarks were again quoted by their Lordships in *Amanat Bibi* v. *Imdad Husain*.[5]

A more searching definition is to be found in the recent case of *Mussamut Chand Kour* v. *Partab Singh*.[6] "The cause of action," said Lord Watson in delivering the judgment of the Judicial Committee, "has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

Refers to the *media* upon which plaintiff prays judgment.

This definition, it is submitted, affirms in substance, though not expressly, the view taken by West, J., in the Bombay cases of *Haji Hasam Ibrahim* v. *Mancharam Kaliandas*,[7] and *Shridar*

Was the same right infringed in substance?

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[1] L. R., 12 I. A., 20 [1884].
[2] I. L. R., 12 I. A., 119 [1885].
[3] "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action," &c.
[4] 11 M. I. A., 605 [1867].
[5] L. R., 15 I. A., 111 [1888].
[6] L. R., 15 I. A., 157 (158) [1888].
[7] I. L. R., 3 Bom., 137 [1878].

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Vinayak v. *Narayan Valad Babaji*.[1] The facts in the two suits must be connected, so that, had the plaintiff's whole case been brought forward before, it would have been conclusively determined upon the same investigation. To use the words quoted by West, J., in the later case: "A cause of action is to be regarded as the same if it rests upon facts which are integrally connected with those upon which a right and an infringement of a right have already been once asserted." In order to raise the bar of res judicata, the matter at issue in the two suits must have originated in the same transaction giving rise to the same alleged right in the plaintiff and creating the same alleged duty on the part of the defendant. In other words, res judicata depends upon matter of substance.

In connection with this subject the terms of Explanations I and II to the section require to be looked to. The matter must in the former suit have been alleged by one party and denied or admitted expressly or by implication by the other, and further, any matter which ought to have been made ground of defence or attack in such former suit is to be deemed to have been directly and substantially in issue.

Are the causes of action in the two suits in substance identical? Doorga Persad Singh v. Doorga Konwari [1878].

The question whether the cause of action is the same in two suits may be shortly illustrated in the following cases :—

In *Doorga Persad Singh* v. *Doorga Konwari*,[2] the plaintiff sued to obtain possession by right of inheritance of certain property alleging that he was entitled thereto under a *Kulachar* or family custom excluding female heirs, and he prayed alternatively for a declaration that a deed executed by the defendant, Doorga Konwari, was inoperative after her death, and that he was, as the preferential male heir, entitled to the reversion. The property in question had descended to Doorga Konwari's son, and, after his death, she sued her co-widows and the present plaintiff to recover possession of two-thirds of the property, and to have her possession confirmed as to the remainder. In that suit Doorga Persad attempted to give evidence as to the *Kulachar*, but no issue was raised upon the point, nor did he make any allegation as to the alleged custom in his written statement or grounds of appeal, and it was held that Doorga Konwari was entitled to succeed to the

[1] Bom. H. C., 224 [1874].

[2] I. L. R., 4 Calc., 190 [1878].

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property as the mother and heiress. This adjudication was pleaded in bar to Doorga Persad's suit. Sir Barnes Peacock, delivering the judgment of the Privy Council, distinguished the case of *Hunter* v. *Stewart*[1] upon the ground that the allegations and equities in that suit were different in the two cases, observing: "In this case, although the allegations are different, the claim is the same," and referring to the observations of Lord Westbury in *Srimut Rajah Mootoo* v. *Katama Natchiar*,[2] his Lordship said: "If the defendant did not resist the claim in the former suit upon the ground of the family custom, he is not entitled in the present suit to upset the former decision because he failed to set up a custom, which he ought to have relied upon at that time. The decision in the former suit would be utterly useless if the present suit could be maintained." After citing the observations of the Judicial Committee in *Krishna Behari Roy* v. *Brojeswaree Chowdhranee*,[3] and *Soorjomonee Dayee* v. *Suddanund Mohapatter*[4] as to the expression "cause of action," his Lordship held as to the first point that the plaintiff was debarred by reason of the adjudication in the previous suit from claiming the property by right of inheritance. Claim as heir.

But as to whether the plaintiff was entitled to set aside the deed upon his proving his title as presumptive heir, his Lordship observed: "No doubt the family custom might be set up in this suit for that purpose, for although the plaintiff is barred by the former adjudication from setting it up for the purpose of shewing that he is entitled to possession during the life of the defendant No. 1, he is not thereby barred from shewing that, upon her death, he, if he survives, will be entitled to succeed her,"[5] but held that upon the state of the evidence no declaration should be made, as such a course would involve a remand, and all the parties interested were not before the Court. The question as to the family custom was accordingly left open for decision in a subsequent suit. Claim as reversioner.

So where a plaintiff sued in 1847, claiming a moiety of an estate in priority to the defendant, a Hindu widow, alleging the property

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[1] DeG. F. & J., 168; 31 L. J. (Ch.), 346 [1861].

[2] 11 M. I. A., 50 (73) [1866].

[3] I. L. R., 1 Calc., 144; L. R., 2 I. A., 283 [1875].

[4] 12 B. L. R., 304 [1873].

[5] I. L. R., 4 Calc., 200 [1878].

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to be joint and undivided, and the suit was dismissed on the ground that the property was separate and distinct, it was held that he was not debarred from claiming as heir next in reversion after the defendant, admitting the widow's title to be prior to his, and seeking to have an alienation made by her set aside.[1]

Ejectment suit.

Where a landlord sues a tenant in ejectment alleging that the tenant holds under a lease, and the suit is dismissed on the ground that the lease is not genuine or has not been proved, it has been held that this does not bar a subsequent suit by the landlord as owner to eject the tenant, alleging that the tenant is in occupation paying rent and has refused to give up possession. In the case of *Girdhar Manordas* v. *Dayabhai*[2] this was the opinion of the majority of the Court,[3] which proceeded upon the ground that the fact that two suits are based upon a tenancy does not imply that the suits are on the same cause of action, and that what has to be looked to in each case is whether the particular contract or relation put forward in the first case is or is not the same specific contract sued on in the second. In the former suit the plaintiffs "asserted terms embodied in and constituted by the leases which they failed to prove. They now allege an entirely different legal relation.....obviously quite distinct from the one they relied on before. It would have to be proved by different evidence." The learned Judges considered the argument derived from Explanation II, and held that it did not apply to the case, as the landlords had succeeded in the first instance on the ground chosen by them, and the Appellate Court had refused to entertain their claim on any other ground.

Girdhar Manordas v. Dayabhai [1882].

The dissenting Judge was, however, of opinion that the cause of action was the same in both suits, namely, the breach of an obligation arising out of the relation of landlord and tenant, and that the plaintiff having failed in one suit could not be allowed in another to establish the same claim by different evidence.

Matters in issue.

It was no doubt with a view to elucidating the subject that the Legislature, in enacting Act X of 1877, discarded the term "cause of action." The question chiefly to be considered is whether the

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[1] *Sunkur Dyal Singh* v. *Purmessur Singh*, 6 W. R., 44 [1866].

[2] I. L. R., 8 Bom., 174 [1882].

[3] West and Pinhey, JJ., Melvill, J., dissenting.

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matter decided in the previous suit was in substance part of the cause of action in the second suit, and the matter cannot be said to have been determined in the previous suit unless it was put in issue and directly determined.

Res Judicata will now be examined from five different points of view. And first as to the competence of the Court.

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CHAPTER II.

FORUM.

Rule as to competent Courts—Rule in England—Special reasons for a different rule in India—*Mussamut Edun* v. *Mussamut Bechun* [1867]—Principle enunciated by the Chief Justice—*Chunder Coomar Mundul* v. *Nunnee Khanum* [1873]—*Krishna Behari Roy* v. *Brojesvori Chowdhranee* [1875]—Calcutta decisions—*Misir Raghobardial* v. *Sheo Baksh Singh* [1882]—Observations upon the Indian Courts—*Run Bahadur Singh* v. *Lucho Koer* [1884]—Established rule—Decisions of Revenue Courts—Decision of Special Judge and Revenue Officer under Bengal Tenancy Act—Revenue Courts in the North-West Provinces—Other special Courts—Decision not appealable does not work an estoppel—*Bholabhai* v. *Adesang* [1884]—Competent to try with conclusive effect—Concurrence of jurisdiction must exist as to Appellate Tribunals—Competent means competent at the time of the first suit—Upon appeal the matter becomes *res subjudice*—*Nilvaru* v. *Nilvaru* [1881]—*Balkishan* v. *Kishan Lal* [1888]—Interlocutory Orders and Orders in execution-proceedings—Principle upon which such orders are conclusive—*Ram Kirpal* v. *Rup Kuari* [1883]—*Mungal Pershad Dichit's case* [1881]—*Beni Ram* v. *Nanhu Mal* [1884]—Orders in execution-proceedings—Act XIV of 1882, s. 244.

Rule as to competent Courts.

THE rule established by the Privy Council, and since acted upon in this country,[1] requires Courts to be of concurrent jurisdiction as regards the pecuniary limit and subject-matter of the suit and able to try the suit with conclusive effect, before the decision of one Court can work an estoppel as to matter coming before another Court. The rule is of a special nature, and has been framed for special reasons connected with the constitution of the Indian Courts.

Rule in England.

In England, however, the rule, so far as it can be gathered from the reported cases, is more flexible. In 1775 in a special case reserved upon an indictment,[2] a sentence of expulsion made by the Master and one Fellow of Queen's College, Cambridge, confirmed by the Master and a majority of the Fellows, was held by Lord Mansfield conclusive in a prosecution for assaulting a fellow-commoner by turning him out of the garden. The sentence was held to be of the nature of the sentence of an

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[1] See *Babhabat* v. *Narharbat*, I. L. R., 13 Bom., 224 [1888]; *Ganapati* v. *Chathu*, I. L. R., 12 Mad., 223 [1889]; *Vithilinga* *Padayachi* v. *Vithilinga Mudali*, I. L. R., 15 Mad., 111 [1891].

[2] *Rex* v. *Grundon*, 1 Cowp., 315 [1775].

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Ecclesiastical or Admiralty Court fixed and conclusive until reversed (in this instance) upon appeal to the Visitor of the College. In a case decided in 1831,[1] the cause related to the rights of the County of the City of Chester as between that city and the county palatine of Chester. Tenterden, C. J., held that a document, purporting to be a decree made by some members of the Court of Exchequer associated with others who were not members, could not be received in evidence, the proceeding being one before persons not forming any Court known to the laws of the country as having competent authority. In *Flitters* v. *Allfrey*,[2] the judgment of a County Court pronouncing a tenancy to be a yearly, not a weekly, tenancy, was held by the Court of Common Pleas, on proof that the matter tried was the same, to be a conclusive estoppel, although the plaintiff was shewn to have obtained a verdict by means of perjury ; and it appears to be well settled that the judgment of a County Court in England is conclusive evidence between the same parties upon the same matter directly in question in another Court.[3]

Special reasons for a different rule in India.

It is of much more importance in this country than in England that, in order to make a judgment between parties in one Court conclusive between the same parties upon the same point in another Court, both Courts should be of concurrent jurisdiction ; otherwise the decision of a Court limited to try suits of small value might be conclusive in another Court for an entirely different purpose, and for a very large amount. As remarked by Sir Barnes Peacock in *Mussamut Edun* v. *Mussamut Bechun*[4] : "A bond of a very large amount might be set up as an answer, in a suit in the Munsif's Court or in a Court of Small Causes for a very small amount ; but it could never be held that a decision in those Courts as to the validity or invalidity of the bond as a defence to the suit would be conclusive upon the Judge in a suit brought upon the bond, and upon the High Court in a regular appeal from a decree in that suit."

Mussamut Edun *v.* Mussamut Bechun [1867].

In the case now cited the defendant had sued the plaintiff in the Collector's Court under Act X of 1859 for rent upon an agreement

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[1] *Rogers* v. *Wood*, 2 B. & Ad., 245 [1831].
[2] L. R., 10 C. P., 29 [1874].
[3] See *Routledge* v. *Hislop*, 2 E. & E., 549 [1860] ; *Buckland* v. *Johnson*, 15 C. B. (N. S.), 145 [1854].
[4] 8 W. R., 175 [1867].

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for a lease, and the plaintiff set up in defence a bond by way of set-off authorising him to deduct a portion of the rent, and apply it in reducing the amount due by the defendant on the bond. The bond having been found genuine, the plaintiff instituted the present suit to recover certain monies which he alleged to be due thereunder. The question was whether the defendant could be allowed to say the bond was not genuine after the finding in the previous suit. The first suit was one which a Collector alone had jurisdiction to try,[1] and from his decision a special appeal lay to High Court ; the second suit was one in which a regular appeal lay from the decision of a Judge or a principal Sudder Ameen to the High Court. Campbell and Phear, JJ., having differed in opinion, the Chief Justice supported the opinion of the latter, holding that the validity of the bond was not res judicata between the parties, as the two Courts were not of concurrent jurisdiction.

Principle enunciated by the Chief Justice.

Sir Barnes Peacock observed : "An estoppel shuts out enquiry into the truth, and it is therefore very necessary to see whether such an estoppel was caused by the decision of the Collector." After citing the principles laid down by Lord Walsingham in the *Duchess of Kingston's case* as to the conclusiveness of judgments of Courts of concurrent and exclusive jurisdiction, the Chief Justice pointed out that the Collector's Court was neither a Court of exclusive jurisdiction, nor of concurrent jurisdiction with the Zillah Court, as to the validity of the bond ; and that as regards the bond (except so far as it might form an answer to a claim for rent) the Collector's Court had no jurisdiction at all. The rule is then stated in these terms : "Concurrency of jurisdiction is a necessary part of the rule which creates an estoppel in such a case. I do not know precisely how it is that the doctrine of estoppel has been engrafted in the rules of law applicable to the Mofussil Courts. It seems to have been taken from the English Law, without also taking the rule, that estoppels must be pleaded ; a rule which is not applicable to the Courts in this country.[2] It is quite clear that, *in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit* in which the first

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[1] Act X of 1859, s. 23.

[2] *See*, however, the definition of pleadings in *Sayad Mahammad* v. *Fatteh Muhammad*, I. L. R., 22 Calc., 324 [1894].

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decision is given in evidence as conclusive." The Chief Justice then said that if it were necessary to determine that the matter came collaterally or incidentally before the Collector he would have so held, and relied upon the judgment of Knight Bruce, V. C., in *Barrs* v. *Jackson*,[1] which was reversed upon grounds in no way questioning the Vice-Chancellor's statement of the rule of res judicata.

The decision in *Mussamut Edun* v. *Mussamut Bechun*,[2] pronounced at a time when estoppels were still regarded with some disfavour in this country, was not for some years always acted upon,[3] but the rule has since been fully affirmed by the Judicial Committee.

Chunder Coomar Mundul *v.* Nunnee Khanum [1873].

In 1873 the question came before a Full Bench at Calcutta in *Chunder Coomar Mundul* v. *Nunnee Khanum*.[4] There a raiyat obtained a decree in the Court of the Deputy Collector under Act X of 1859, to the effect that he was holding under a genuine *maurasi* pottah and had been illegally ejected by the landlord. The decree having been upheld on appeal to the Judge and on special appeal to the High Court, the landlord sued the raiyat's heirs in the Court of the Munsif to recover possession on the ground that the pottah was spurious. The heirs set up the decision in the former suit, relying upon the rule of res judicata in the Code of 1859. The Division Bench, being of opinion upon the previous authorities[5] that the matter was not free from doubt, referred the

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[1] 1 Y. & C., 585 [1842]; S. C., 1 Phil., 582 [1845]. See *supra*, pp.

[2] 8 W. R., 175 [1867].

[3] The rule was acted upon in *Haradhun Dey* v. *Golam Hossein*, 8 W. R., 487 [1867]; *Tekaitnee Goura Coomaree* v. *Bengal Coal Co.*, 13 W. R., 129; 9 W. R. (P. C.), 252 [1870]; and the following decisions as to Small Cause Courts: *Chunder Narain Mojoomdar* v. *Prithanund Asrum*, 12 W. R., 290 [1867]; *Sunkur Lall Pattuck* v. *Mussamut Ram Kalee*, 18 W.R., 104 [1872]; *Pohol Mullick* v. *Fukeer Chunder Putnaik*, 22 W. R., 349 [1874]; *Inayat Khan* v. *Rahmat Bibi*, I. L. R., 2 All., 97 [1879]; *Khundu* v. *Tatia*, 8 Bom. H. C. (A. C.), 23 [1871] (a suit to recover the price of the skin and flesh of an ox); *Manappa Mudali* v. *S. T. McCarthy*, I. L. R., 3 Mad., 192 [1881]; *Pathuma* v. *Salimamma*, I. L. R., 8 Mad., 83 [1884] (Munsif's Court). The rule was disregarded in *Huro Lall Saha* v. *Sree Tirthanund Thakoor*, 11 B. L. R., 437 (*n*) [1870]; *Nund Kishore Singh* v. *Huree Pershad Mundul*, 13 W. R., 65 [1870]; *Bemola Soondury Chowdhrain* v. *Punchanun Chowdhry*, I. L. R., 3 Calc., 705 [1878]; *Toponidhee Dhirj Gir Gossain* v. *Sreeputty Sahanee*, I. L. R., 5 Calc., 832 [1880].

[4] 11 B. L. R., 434 [1873].

[5] *See* in addition to the cases cited in the last note but one, *Gooroodoss Roy* v. *Ramnarain Mitter*, B. L. R., Sup. Vol. 628 [1867]; *Jonardun Acharjee* v. *Haradun Acharjee*, ib., 1020 [1868]; and *Prosonno Paul Coomar Paul Chowdhry* v. *Koylash Chunder Chowdhry*, ib., 759 [1867], Full Bench decisions upon s. 23 of Act X of 1859.

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case to a Full Bench. The learned Judges of the Full Bench, though not upon precisely the same grounds, held that the Collector's decision was not conclusive.[1]

Krishna Behari Roy *v.* Brojeswari Chowdhranee [1875].

The question came before the Judicial Committee in the case of *Krishna Behari Roy* v. *Brojeswari Chowdhranee*,[2] which decision appears to leave out of sight the question of concurrent jurisdiction. There the appellant had intervened in a suit which the respondent brought in a Court of inferior jurisdiction to set aside certain *putni* leases granted by his adoptive mother. The appellant contended that he was the heir, and that the respondent had no title as adopted son. An issue was tried and found in favour of the adoption, and it was held that a subsequent suit to set aside the adoption was barred by the previous finding. The Judicial Committee observe: "By the general law where a material issue has been tried and determined between the same parties in a proper suit and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them."

Calcutta decisions.

Toponidhee Dhirj Gir Gossain *v.* Sreeputty Sahanee [1880].

This decision was expressly followed by the Calcutta High Court in *Run Bahadur Singh* v. *Lucho Koer*,[3] where it is pointed out that the two Courts in *Krishna Behari Roy* v. *Brojeswari Chowdhranee*[4] were not of concurrent jurisdiction,[5] and in *Toponidhee Dhirj Gir Gossain* v. *Sreeputty Sahanee*,[6] where the decison of a Munsif upon a question of heirship was held to be res judicata in a suit brought in the Court of a Subordinate Judge to recover property worth a lakh of rupees.

In the case last cited, White, J., observed: "I must confess that if I were unfettered by authority, I should be inclined to hold that the Munsif's Court, although competent to try the issue of heirship for the purpose of arriving at a conclusion upon a matter wholly within his jurisdiction, was yet not competent to find upon that issue, so as to make it res judicata in a suit instituted in a Court of superior jurisdiction and relating to a large estate whose value is far beyond the pecuniary limits of the Munsif's jurisdiction.

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[1] The judgment of Mitter, J., 11 B. L. R., at 441—450, and that of Phear, J., at 456, 457, appear most accurately to state the rule.

[2] L. R., 2 I. A. 283 [1875].

[3] I. L. R., 6 Calc., 406 [1880].

[4] I. L. R., 2 I. A., 283.

[5] I. L. R., 6 Calc., 417 [1880].

[6] I. L. R., 5 Calc., 832 [1880].

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I am such impressed with the judgment of Peacock, C. J., in *Mussamut Edun* v. *Mussamut Bechun*.[1] . . . The doctrine laid down by Peacock, C. J., was not referred to in any of the cases which I have cited, nor, so far as appears in the reports, was brought to the notice of the Courts which decided these cases. Notwithstanding this, I think I am bound by the decision of the Privy Council which, having the facts before it, expressly decides the appeal of *Krishna Behari Roy*, on the ground that the main issue which he sought to have tried in his suit had already been determined by a Court of competent jurisdiction." And the Court accordingly held that the decision of the Munsif upon the question of title was conclusive between the parties as to every portion of land held under that title.

These decisions are overruled by the observations of the Privy Council in *Misir Raghobardial* v. *Sheo Baksh Sing*,[2] and *Run Bahadur Singh* v. *Lucho Koer*,[3] and neither a question of title, nor any other question, can be res judicata by reason of a finding of a Court inferior as regards its pecuniary limit to the Court trying the question.

In *Misir Raghobardial* v. *Sheo Baksh Singh*,[4] a suit on a bond for Rs. 12,000, the defendant pleaded that in a previous suit for interest in the Assistant Commissioner's Court (the jurisdiction of which was limited to Rs. 5,000) an issue was raised and decided to the effect that the defendant had only received Rs. 4,790 under the bond, and the decision was upheld on appeal. The matter of the consideration for the bond had been directly and substantially in issue in the first suit which had been finally heard and decided in a Court of competent jurisdiction. The present suit was brought in the Court of the Deputy Commissioner, the pecuniary limit of whose jurisdiction was unrestricted. The Courts in India held that the second suit was barred by section 13 of Act X of 1877.

Misir Raghobardial v. Sheo Baksh Singh [1882].

Their Lordships of the Privy Council first observed that section 2 of Act VIII of 1859, the Code of Civil Procedure, for which Act X of 1877 was substituted, would not have applied to the

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[1] 8 W. R., 175 [1867].

[2] I. L. R., 9 Calc., 439 ; L. R., 9 I. A., 197 [1882].

[3] I. L. R., 11 Calc., 301 ; L. R., 12 I. A., 23 [1884].

[4] I. L. R., 9 Calc., 439 ; L. R., 9 I. A. 197 [1882].

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case, the 'cause of action' in the two suits being different; but that, independently of the provision in Act VIII of 1859, the Courts in India had recognised the rule laid down in the *Duchess of Kingston's case*,[1] and that the intention of the Legislature was to embody in sections 12 and 13 of Act X of 1877 the law then in force in India instead of the imperfect provision in the Code of 1859. Their Lordships were of opinion that the words 'competent jurisdiction' in Act X of 1877 meant '*a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words, a Court of concurrent jurisdiction*,' and referred with approval to the observations of the Chief Justice in *Mussamut Edun* v. *Mussamut Bechun*.[2]

Observations upon the Indian Courts.

Upon the subject of competent Courts their Lordships said:—"As to what is a Court of concurrent jurisdiction it is material to notice that there is in India a great number of Courts; that one main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction; and that by the Code of Civil Procedure a suit must be instituted in the Court of the lowest grade competent to try it. . . The qualifications of a Munsif and the authority of this judgment would not be the same as those of a District or of a Subordinate Judge, who have jurisdiction in civil suits without any limit of amount. In their Lordships' opinion it would not be proper that the decision of a Munsif, upon (for instance) the validity of a will, or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or the adoption. Other similar cases are mentioned in the judgment of the Chief Justice. It is true that there is an appeal from the Munsif's decision, but that upon the facts, would be to the District Court, and not to the High Court. And that the decision should be conclusive would be still more improper as regards many other of the various Courts in India, the qualifications of whose Judges differ greatly. By taking concurrent jurisdiction to mean *concurrent as regards the pecuniary*

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[1] 2 Sm. L. Ca., 9th ed., 812. *See* the observations of the Judicial Committee in *Khugowlee Singh* v. *Hossein Bux Khan*, 7 B. L. R., 673 (680) [1871].

[2] 8 W. R., 175 (179) [1867].

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limit as well as the subject-matter, this evil or inconvenience is avoided; and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case."[1]

The Judicial Committee in *Run Bahadur Singh* v. *Lucho Koer*,[2] referring to the above remarks further say: "If this construction of the law were not adopted, the lowest Court in India might determine finally, and without appeal to the High Court, the title to the greatest estate in the Indian Empire."[3] In the case now cited the plaintiff sought to recover his deceased brother's estate from the widow, an issue between the parties being as to the separate or joint ownership of the brothers. The same issue had been determined between the parties in a proceeding under Act 27 of 1860, when the Munsif decided in the widow's favour. It appeared also that in a certain rent-suit decided by the Munsif under Act VIII of 1869, in which the plaintiff had intervened, the same issue was raised and determined in his favour. It was contended for the defendant that in the latter case, there being no provision in Act VIII of 1869 similar to that in Act X of 1859[4] to the effect that title should not be affected by the decision in rent-suits, the plaintiff was bound by the judgment. A Division Bench of the Calcutta High Court held that the question as to separate or joint ownership was res judicata, observing, "It would seem to be refining too much to confine the doctrine of res judicata in India to exactly parallel Courts."[5] The Judicial Committee, however, approved of the decisions above cited, and held that the decision of the Munsif in the rent-suit was not conclusive, but their Lordships held upon the question of fact that the widow was entitled to succeed, the brothers having separated.

Run Bahadur Singh v. Lucho Koer [1884].

The rule is now clearly settled that in order to make an adjudication by one Court final and conclusive in another Court, the first Court must have been possessed of a jurisdiction sufficient to try the matter which arose in the subsequent suit.

Established rule as to the competency of Courts in questions of res judicata.

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[1] Compare the remarks of Phear, J., in *Chunder Coomar Mundul* v. *Nunnee Khanum*, 11 B. L. R., 457 [1873].

[2] I. L. R., 11 Calc., 301; L. R., 12 I. A., 28 [1884].

[3] I. L. R., 11 Calc., 301; L. R., 12 I. A., 309.

[4] Section 77. *See* s. 33, Act VII of 1869 (B.C.).

[5] I. L. R., 6 Calc., 406 (415) [1880].

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Decisions of Revenue Courts.

The Revenue Courts being Courts of limited jurisdiction, it was held by a Full Bench in *Hurri Sunker Mookerjee* v. *Muktaram Patro*[1] that the decision of a Collector in a suit under Act X of 1859, declaring the plaintiff entitled to assess rent upon land alleged by the defendant to be *lakhiraj*, was not conclusive between the parties in a suit for arrears of rent under Bengal Act VIII of 1869; but one Judge was of opinion that such a decision would be binding upon them in a subsequent suit which, but for the passing of the later Act, would have been brought in the Revenue Court. The judgment of the majority proceeded upon the authority of *Khugowlee Singh* v. *Hossein Bux Khan*,[2] and *Chunder Coomar Mundul* v. *Nunnee Khanum*.[3]

Act X of 1859 and Bengal Act VIII of 1869 are now repealed by the Bengal Tenancy Act (VIII of 1885) in the territories to which that Act extends by its own operation,[4] so that the question of the conclusiveness of decisions of the Revenue Courts is now of little importance in the Lower Provinces of Bengal.

Under Act VIII of 1869 it has recently been held that if a Collector, professing to proceed under the provisions of section 38 of that Act, exceeded his jurisdiction by assessing the rent instead of determining the existing rates of rent, his proceedings were not conclusive between the parties in a subsequent suit for rent.[5]

Decision of Special Judge under the Bengal Tenancy Act.

Chapter X of the Bengal Tenancy Act (VIII of 1885) provides for a record-of-rights to be made by a Revenue Officer, and for the record of certain particulars, including the nature and incidents of the tenancy, and the rent payable. Under section 108 an appeal lies from the decision of the Revenue Officer to a Special Judge, and in certain cases of disputes as to entries in the record [section 106], a special appeal lies to the High Court [section 108 (3)]. In all other cases the decision of the Special Judge is final,[6]

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[1] 15 B. L. R., 238 [1875].
[2] 7 B. L. R., 673 [1871].
[3] 11 B. L. R., 434 [1873].
[4] *i.e.*, those under the administration of the Lt.-Govr. of Bengal, except Orissa and the Scheduled Districts (Act XIV of 1874). The Act has not yet been extended to Orissa.
[5] *Merjah Janand* v. *Krishto Chunder*, I. L. R., 10 Calc., 507 [1884].
[6] See *Sheobarat Koer* v. *Nirpat Roy*, I. L. R., 16 Calc., 596 [1889]; *Lala Kirat Narain* v. *Palukdhari Pandey*, I. L. R., 17 Calc., 326 [1889]. A decision under s. 158 of the Tenancy Act does not operate as res judicata in a regular suit. *Peary Mohun Mukerji*, v. *Ali Sheikh*, I. L. R., 20 Calc., 249 [1892].

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and such a decision will, it is conceived, be conclusive, as to the matters decided, in any subsequent suit between the parties.

Entries in record-of-rights, decision of Revenue Officer as to.

A question, as to entries in a record-of-rights heard and decided by a Revenue Officer under section 106 of the Bengal Tenancy Act, has been held res judicata between the same parties in a subsequent civil suit. In *Gokhul Sahu* v. *Jodu Nundun Roy*[1] a Division Bench at Calcutta, distinguishing the case of *Hurri Sunker Mookerjee* v. *Muktaram Patro*[2] as being based on the principle that the decision of a Revenue Court on a question of title is no bar to the trial of the same question by the ordinary Civil Courts, referred to the provisions of the Tenancy Act, and observed: "We cannot suppose that it was the intention of the Legislature, after providing for the trial of disputes regarding entries in the record-of-rights by the Code of Civil Procedure and by a special Appellate Court, that such disputes should be liable to be re-opened before the ordinary Civil Courts of the country."[3]

Revenue Courts in the North-West Provinces.

The decision of rent-suits was transferred in Lower Bengal to the ordinary Civil Courts by Act VIII of 1869, but, in the North-West Provinces, Revenue Courts still exist, and the decisions have taken a similar course. On the one hand, it has been recognised that the Revenue Courts are tribunals of limited jurisdiction existing for special purposes, so that a decision of a Revenue Court upon a matter within the jurisdiction of the Civil Courts would not operate as res judicata.[4] On the other hand, the view has been expressed that where a matter is limited to the cognisance of the Revenue Courts, or where a special and summary remedy is given

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[1] I. L. R., 17 Calc., 721 [1890].

[2] 15 B. L. R., 238 [1875].

[3] *See*, however, *Secretary of State* v. *Nitye Singh*, I. L. R., 21 Calc., 38 [1894]. These cases were distinguished in *Karmi Khan* v. *Brojo Nath Das*, I. L. R., 22 Calc., 244 (249) [1894].

[4] *Husain Shah* v. *Gopal Rai*, I. L. R., 2 All., 428 [1879]; *Ashgar Ali Shah* v. *Jhanda Mal*, I. L. R., 2 All., 839 [1880]; *Chotu* v. *Jitan*, I. L. R., 3 All., 63 [1880]; *Muhammad Abu Jafar* v. *Wali Muhammad*, I. L. R., 3 All., 81 [1880]; *Raj Bahadur* v. *Birmha Singh*, I. L. R., 3 All., 85 [1880]; *Gopal* v. *Uchabal*, I. L. R., 3 All., 51 [1880]; *Sukhdaik Misr* v. *Karim Chaudari*, I. L. R., 3 All., 521 [1881]; *Debi Prasad* v. *Jafar Ali*, I. L. R., 3 All., 40 [1880], *Birbal* v. *Tika Ram*, I. L. R., 4 All., 11 [1881] (decisions under Act XVIII of 1873); *Amri-Lal* v. *Balbir*, I. L. R., 6 All., 68 [1888]; *Phulabra* v. *Jeolal Singh*, I. L. R., 6 All., 52 [1883]; *Lodhi Singh* v. *Ishri Singh*, I. L. R., 6 All., 295 [1884]; *Ajudhia Prasad* v. *Sheodin*, I. L. R., 6 All., 403 [1884]; *Ganga Prasad* v. *Buldeo Ram*, I. L. R., 10 All., 347 [1888] (decisions under Act XII of 1881).

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to a plaintiff resorting to those Courts, the decision in respect of such a matter will be final.[1]

In Madras it has been held that a Revenue Court has no power to determine title otherwise than incidentally to the limited jurisdiction conferred on it.[2]

Application under s. 63 of Act II of 1874.

An application by petition under section 63 of the Administrator-General's Act (II of 1874) for payment of monies in the hands of the Secretary of State has been held to be a suit within the meaning of section 13 of the Code, and is binding upon all the parties, whether the order made merely dismisses the petition or directs payment to be made to the petitioner or to other persons represented at the hearing. Such an order is, therefore, effectual to bar any subsequent application upon fresh materials.[3]

Decisions under the Land Acquisition Act.

It would seem to be clear that a decision by a Land Acquisition Judge, in apportionment-proceedings under the Act,[4] as to the title of persons claiming a share of the compensation-money, is only conclusive as regards the title to the property in question, and does not affect the title of the claimants to other property. Here the parties are brought before the Judge compulsorily, and the amount at issue may be unimportant.[5] But as to the property actually acquired the decision would appear to be binding. In *Ram Chunder Singh* v. *Madho Kumari*,[6] the decision of a Civil Court, in proceedings between a *ghatwal* and his under-tenure-holders, in which the right to receive compensation-money was determined, declaring certain under-tenures to be upon sufferance, was held conclusive in a suit by the *ghatwal* to resume one of the under-tenures. Nor is it open to a party to re-open in a regular suit the precise question which has been settled by the decision of a Land Acquisition Judge under section 39 of the Act.[7]

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[1] *Shimbhu Narain Singh* v. *Bachcha*, I. L. R., 2 All., 201 [1879] (under Act XVIII of 1873); *Har Sahai Mal* v. *Maharaj Singh*, I. L. R., 2 All., 294 [1879] (under Act XIX of 1863); *Radha Prasad Singh* v. *Salik Rai*, I. L. R., 5 All., 245 [1883] (under Act XVIII of 1873; *Bateshar Nath* v. *Faiz-ul-hasan*, I. L. R., 5 All., 281 [1888] (under Act XIX of 1873).

[2] *Rama* v. *Tirtasami*, I. L. R., 7 Mad., 61 [1883]; approved in *Gangaraju* v. *Kondireddiswami*, I. L. R., 17 Mad., 106 [1893], dissenting from *Ragava* v. *Rajagopal*, I. L. R., 9 Mad., 89 [1885].

[3] *Smith* v. *Secretary of State*, I. L. R., 3 Calc., 340 [1878].

[4] Act X of 1870, s. 39.

[5] *Nobodeep Chunder Chowdhry* v. *Brojendro Lall Roy*, I. L. R., 7 Calc., 406 [1881].

[6] I. L. R., 12 Calc., 484; L. R., 12 I. A., 188 [1885].

[7] *Nilmonee Singh Deo* v. *Rambundhoo Roy*, I. L. R., 4 Calc., 757 [1879], dissenting from

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A Court is not precluded from entertaining a fresh application for the guardianship of a minor under Act IX of 1861 by reason of the fact that a similar application has been refused.[1]

Decision not appealable does not work estoppel.

It must further be observed that 'competent to try' means 'competent to try with conclusive effect.' A previous decision, therefore, in a case which is not appealable cannot operate as res judicata. *Bholabhai* v. *Adesang*[2] is the leading case on the subject. In that case the first suit for Rs. 119 was in the District Court, and was dismissed in the two lower Courts, and it was held on appeal to the High Court, that the matter being within the cognisance of a Court of Small Causes,[3] there could be no second appeal. A second suit on the same identical cause of action was also brought in the District Court, and dismissed on the ground of res judicata. The Bombay Court held that though the material question in both suits was the same, and the two Courts were physically the same, the jurisdiction was on the two occasions different, the second suit being for a larger amount. "It is now said," observed West, J., "that the decision which was statutably beneath the cognisance of the High Court, binds the High Court in a more important case. Such a result is manifestly opposed to reason, and cannot, we think, have been intended by the Legisture."... "We must construe the section, if possible, so as to avoid an anomalous result, and this end is attained by saying that the words 'competent to try such subsequent suit' in the section mean competent to try the suit or issue on account of its nature with conclusive effect, since otherwise the higher jurisdiction provided by the Code would be excluded by the lower."[4]

Bholabhai *v.* Adesang [1884].

Competent to try with conclusive effect.

Dwarka Singh v. *Solano*, 22 W. R., 38 [1874], and distinguishing *Kaminee Debia* v. *Protab Chunder Sandyal*, 25 W. R., 103 [1876].

[1] *Nehalo* v. *Nawal*, I. L. R., 1 All., 428 [1877].

[2] I. L. R., 9 Bom., 75 [1884].

[3] In *Govind* v. *Dhondbarav* [I. L. R., 15 Bom., 104 (1890)], it was held, following *Bholabhai* v. *Adesang*, that a decision in a suit which was in the nature of a Small Cause Court suit, and in which there was no right of special appeal could not operate as res judicata. And see upon this point *Anusuyabai* v. *Sakharam Pandurang*, I. L. R., 7 Bom., 464 [1883]; *Srirangachariar* v. *Ramasami Ayyangar*, I. L. R., 18 Mad., 189 (191) [1894]. *See* the remarks of Selborne, L. C., in *The Queen* v. *Hutchings*, L. R., 6 Q. B. D., 305 [1881].

[4] "In the Continental Courts of Europe —in which, as in India, an appeal is generally admitted as a part of the regular civil procedure—the rule is that *no matter decided by a lower Court in which an appeal is excluded, can be res judicata for any other case, either in the same or in any other Court.* [*See* Savigny, Syst., s. 293.] A complete recognition of the same principle in the Indian Courts would afford a ready solution of many difficulties, but though it has been

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Must concurrence of jurisdiction exist as to Appellate Tribunals?

The above decision was concurred in in *Vithilinga Padayachi* v. *Vithilinga Mudali*,[1] where Ayyar, J., states the rule thus: "In appealable cases a decision to be res judicata must have been given in a previous suit which the parties according to the ordinary procedure were entitled to take, as to fact and law, ultimately to the same (or corresponding) appellate tribunal to which the subsequent litigation, wherein the decision is relied on as conclusive, could be carried." After citing the passage from Savigny above quoted, the learned Judge said: "That element of res judicata upon which the whole discussion turns, *viz.*, concurrence of jurisdiction, must exist not only as to the original Court, but also as to the appellate tribunals and their powers in the respective suits,"—and he founded his opinion upon the authority of *Misir Raghobardial* v. *Rajah Sheo Baksh Singh*. In *Sabbammal*[2] v. *Huddleston*[3] this decision was, however, qualified. In that case it was objected that the Court which heard the former suit was not competent to try the present suit, because in the former suit the value of the subject-matter was such that an appeal lay not to the High Court direct but to the District Court. The Court, however, overruled this objection holding that the Privy Council decision is no authority for the proposition that the competency of one Court as compared with another is affected by the circumstance that in one case an appeal lies direct to the High Court, and in the other directly to the District Court.

Competent jurisdiction means competent at the time of the first suit.

The word 'competent' is further to be construed with reference to the time when the suit is brought and the jurisdiction of the Court at that period. In *Gopi Nath Chobey* v. *Bhugwat Pershad*,[4] an issue between the parties in a suit in the Munsif's Court substantially raised the question as to the proprietary right to an estate in respect of which *malikana* was claimed. The property

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glanced at on many occasions, *Jania valad Gaba* v. *Hulia valad Waru* [Printed Judgments, 1873, p. 170]; *Mussamut Edun* v. *Mussamut Beehun* [8 W. R., 175]; *Misir Raghobardial* v. *Sheo Baksh Singh* [L. R., 9 I. A., 197], it has never thus far been precisely formulated either by the Legislature or by the Courts." *Bholabhai* v. *Adesang*, at p. 80; *The Queen* v. *Machen* [14 Q. B., 80 (1849); and *The Queen* v. *Gaunt* [L. R., 2 Q. R., 466 (1867)] were also referred to, where it was held that the dismissal of a bastardy summons by the Justices under 7 & 8 Vict., c. 101, s. 2, was not conclusive to bar a second application, there being no appeal allowed from the order of dismissal.

[1] I. L. R., 15 Mad., 111 (118) [1891].

[2] I. L. R., 9 Calc., 439; L. R., 9 I. A., 197 [1882].

[3] I. L. R., 17 Mad., 273 [1894].

[4] I. L. R., 10 Calc., 697 [1884].

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having increased in value, a subsequent suit for *malikana* was brought in the Court of the Subordinate Judge. "It would be unreasonable to hold," observed a Division Bench of the Calcutta Court, "that a decision between the same parties to-day passed by a Munsif having full jurisdiction would not be res judicata ten years hence. The reasonable construction of the words 'in a Court of jurisdiction competent to try such subsequent suit' seems to us to be that it must refer to the jurisdiction of the Court at the time the first suit was brought, that is to say, if the Court which tried the first suit was competent to try the subsequent suit, if then brought, the decision of such Court would be conclusive under section 13, although, on a subsequent date, by a rise in the value of such property or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognisance of a suit relating to that property."

This principle was approved in another Calcutta case,[1] where the first Court was at the time of suit the only Court competent to decide suits of that nature, which subsequently were made cognisable by the ordinary Civil Courts. "There is no doubt," observed the Court, "that the Court in which this suit is brought, and that in which the former suit was brought, are Courts of different jurisdictions; but at the same time the Court in which the former suit was brought was the only Court at that time competent to try suits of that kind, and if this very suit had been brought at that time, the Deputy Collector's Court would have been the only Court competent to try it."

Upon appeal the matter becomes res sub-judice.

Where a Court of Appeal refuses to decide an issue raised and decided in a Court of first instance, there is no res judicata as to that issue. The question ceases to be res judicata upon appeal and reverts to the condition of *res sub judice*. In *Rajah Mokoond Narain Deo* v. *Jonardun Dey*[2] the plaintiff succeeded in the first Court, but his suit was dismissed on appeal on the ground that it was premature. In a second suit for possession of the same mouzah the Court observed: "As between the plaintiff and the defendant, there has been no cause of action similar to the present one already heard and determined by a Court of competent

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[1] *Rajkoonth Panjah* v. *Issur Chunder Choudhry*, I. L. R., 11 Calc., 153 [1884].

[2] 15 W. R., 208 [1871].

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jurisdiction." In *Emamooddeen Sowdaghur* v. *Shaikh Futteh Ali*,[1] the defendant in the first suit set up a purchase in answer to a suit for possession. The Appellate Court refused to decide upon the validity of the purchase, and referred the defendant to a separate suit. In that suit res judicata was pleaded, but the Calcutta Court held, distinguishing the case of *Watson* v. *The Collector of Rajshahye*[2] in the Privy Council, that neither the terms of section 2, Act VIII of 1859, nor the general principles of res judicata operated as a bar. The same view was taken in *Gungabishen Bhugut* v. *Roghoonath Ojha*[3] and *Nilvaru* v. *Nilvaru*,[4] under Act X of 1877. In the latter case the Bombay Court observed: "We consider that when the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be res judicata and becomes *res sub judice*; and if the Appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of Appeal. This very clearly appears from Explanation IV, section 13 of the Civil Procedure Code, Act X of 1877; and we consider that that explanation introduces no new law, but merely states the law as it previously existed."

Nilvaru *v.* Nilvaru [1881].

Effect of judgment under appeal.

The effect of a former judgment against which an appeal is pending was doubted in *Sri Raja Kakarlapudi* v. *Chellamkuri Chellama*,[5] and section 13 is silent as to this point. The principle laid down in *Nilvaru* v. *Nilvaru*[6] has been affirmed by a recent Full Bench case at Allahabad in *Balkishan* v. *Kishan Lal*.[7] In

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[1] 3 C. L. R., 447 [1878].

[2] 12 W. R. (P.C.), 43 [1869].

[3] I. L. R., 7 Calc., 381 [1881].

[4] I. L. R., 6 Bom., 110 [1881].

[5] 5 Mad. H. C., 176 [1870]. "In the lower Court it seems to have been taken for granted that the former judgment could not be conclusive because an appeal was pending. This is not in accordance with English law as the judgment on the rejoinder in *Doe* v. *Wright* [10 A. & E., 763, 783 (1839)] shews. It would, however, be perfectly sound doctrine in the view of other jurists (Unger Ost. Priv. Recht, II, 603; Sav., Syst., VI, 297, *seq*. Waihter, II, 589). As an Englishman I should be sorry to invite a comparison between the reasons given by these great jurists for that and those embodied in the English cases for the contrary opinion," *per* Holloway, J. at p. 177. Upon this point a passage in Pothier (Law of Obligations, translated by Mr. Evans, Vol. i, 534) is cited in the Allahabad case, I. L. R., 11 All., 148 (160).

[6] I. L. R., 6 Bom., 110 [1881].

[7] I. L. R., 11 All., 148 [1888]. For the rule of *lis pendens* as applied to foreign judgments, see *The Delta*, L. R., 1 P.D., 393 [1876]; *Fakuruddeen Mahomed Assun* v. *Official Trustee of Bengal*, I. L. R., 7

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that case the effect of judgments in pending suits, and the construction of Explanation IV of section 13 received consideration.

Balkishan *v.* Kishan Lal [1888].

The first suit was for the recovery of an annual *malikana* for three years, and was dismissed in the Munsif's Court, but decreed on appeal. Pending a second appeal to the High Court, the plaintiff brought another suit for an additional year's *malikana* which had accrued after the institution of the first suit. The two lower Courts decreed the second suit on the ground of res judicata, but the first suit was ultimately, on second appeal, dismissed by the High Court. The second suit coming up on second appeal, the High Court held that the trial of the second suit was not[s] barred in the lower Courts by the operation of section 12 of the Code, that the decree of the Lower Appellate Court in the first suit which, at the date of the institution of the second suit, was under appeal to the High Court, could not work an estoppel by res judicata, but that the judgment of the High Court in the first suit was binding and conclusive as regards the subject-matter of the second suit when that suit came up to the High Court on second appeal. The matter adjudicated upon in both suits was identical, being the plaintiff's title to *malikana*, although the demand was made in respect of the liability of the defendants for different years.

Interlocutory orders and orders in execution-proceedings.

Upon general principles of law, Interlocutory Orders and Orders in Execution-proceedings, if not appealed from, are binding upon the parties in all subsequent proceedings in the same suit. It was stated in a recent case[1] that the principle underlying section 13 of the Code applies to such orders, although that section does not in terms apply to them, the decision of the Privy Council in *Ram Kirpal* v. *Rup Kuari*[2] being relied upon as having this effect.

Ram Kirpal *v.* Rup Kuari [1883].

In the case last cited the question arose in the course of execution-proceedings whether a decree of 1862, according to its true

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Calc., 82 [1881]: *see* also *Meckjee Khetsee* v. *Kasowjee Devachund*, 4 C. L. R., 282 [1879], where, under s. 20 of the Code, it was held that priority of time is the test for determining which suit is to be stayed; *Bissessur Singh* v. *Gunput Singh*, 8 C. L. R., 113 [1880], a case under s. 12, where the matter in issue in the two suits was not identical.

[1] See *Kishan Sahai* v. *Aladad Khan*, I. L. R., 14 All., 64 (66) [1891], where the objector having been on his own application added as a party respondent to an appeal, and having upon remand failed to make a defence, was not allowed to urge by way of objection to the execution of the decree passed against him, matters which might have formed part of his defence. See *Bandey Karim* v. *Romesh Chunder*, I. L. R., 9 Calc., 65 (67) [1882].

[2] I. L. R., 6 All., 269; L. R., 11 I. A., 37 [1883].

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construction, awarded mesne profits. That question had been determined in the affirmative in 1867 in a previous stage of the proceedings in execution of the same decree by the Judge of Gorakhpur, and the execution Court considered itself to be bound by that decision. Upon appeal to the High Court, the question was referred to a Full Bench whether the law of res judicata applied to proceedings in execution of decree, and was answered in the *negative* ; whereupon the Divisional Court decreed the appeal, and ordered that the execution of the decree for mesne profits should be disallowed. Sir Barnes Peacock, in delivering the judgment of the Privy Council, observed :—

Allahabad Full Bench.

Privy Council.

"It is unnecessary for their Lordships to express any opinion as to the answer of the High Court to the question propounded by the Division Bench, though they must not be understood as concurring in it. . . . The question (if the term 'res judicata' was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a Court of competent jurisdiction in a former suit) was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. *It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends, not upon section* 13 *of Act X of* 1877, *but upon general principles of law. If it were not binding, there would be no end to litigation.*"

Principle upon which interlocutory orders are conclusive.

Their Lordships, therefore, held that the judgment of 1867 was final and binding upon the parties and those claiming under them whether that judgment was appealable or not, and that the High Court had erred in assuming jurisdiction to examine the terms of the decree of 1862. "They acted as if they had been sitting upon an appeal against the order of Mr. Probyn, but they were not so sitting."

Mungull Pershad Dichit's case [1881].

In *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*,[1] the Judicial Committee had held that an order for attachment,

[1] I. L. R., 8 Calc., 51 ; L. R., 8 I. A., 123 [1881].

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made erroneously at a time when the decree is barred by limitation, is nevertheless valid unless reversed on appeal. "The order," said their Lordships, "was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached. . . A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the defendant, if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff, his decree is valid unless reversed upon appeal. . . . An application for the execution of a decree is an application in the suit in which the decree was obtained."

Beni Ram *v.* Nanhu Mal [1884].

In *Beni Ram* v. *Nanhu Mal*[1] a dispute had arisen as to the true construction of a decree embodying the terms of a compromise, and the execution Court made an order, on the 25th January 1879, against which no appeal was preferred, declaring that interest was payable at twelve annas per cent. per mensem until realisation. It was contended in a subsequent application for execution that the decree-holder was only entitled to interest for two years from the decree, and the High Court took this view. The Judicial Committee observed: "The High Court took no notice of the ground upon which the Subordinate Judge decided—that the question had been concluded by his order of the 25th January 1879, and their Lordships think it should be remarked, in justice to the High Court, that this may be accounted for by the fact that, not long before this, the Full Bench of that Court had held that the law, *which they call the law of res judicata*, was not applicable to execution-proceedings. The question now for their Lordships' decision is, whether the order of the 25th January 1879 was not conclusive between these parties. It was an order made in the execution-proceedings in this very suit; and the decision of this Board in *Ram Kirpal* v. *Rup Kuari*[2] is exactly in point."

It must therefore be taken as settled, that the conclusiveness of interlocutory orders does not depend upon the rule of res judicata *as defined in section* 13 *of the Code*. At the same time the

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[1] I. L. R., 7 All., 102; L. R., 11 I. A., 181 [1884]

[2] I. L. R., 6 All., 269; L. R., 11 I. A., 37 [1883].

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conclusiveness of a step in a judicial proceeding has frequently been referred to that rule. In *Peareth* v. *Marriott*,[1] an order in an administration suit, by which the trustees of a will were directed to pay to a widow an annuity free from all deductions except income-tax, having been acted upon for twenty years, the widow presented a petition claiming that, by the terms of the will, income-tax ought not to be deducted. The Court of Appeal held that the matter was res judicata by virtue of the previous order, Jessel, M. R., observing: "What is the meaning of res judicata? It is a decree *inter partes* on the same subject." And, whether the adjudication operates as a bar in proceedings had in continuation of the same suit or in a separate and distinct suit, the effect is the same—the matter passes *in rem judicatam*.

Orders in execution-proceedings.

Thus, it has been held that the decision by a competent Court that an application for the execution of a decree is barred by limitation has the effect of res judicata, as also a decision that an application for execution is not time barred. Although such a decision may be erroneous, yet so long as it remains unreversed in appeal it is valid and binding, and the question cannot be re-opened.[2]

It is further settled by the case of *Ram Kirpal* v. *Rup Kuari* that a construction placed upon a decree by an execution Court is conclusive as to the effect of that decree so far as the parties are concerned. But a decree cannot be extended in execution beyond the real meaning of its terms, and it would seem that the matter must have been controverted as well as determined upon judicially.[4]

An order, therefore, refusing an application to execute a decree is not an adjudication within the rule of res judicata.[5]

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[1] L. R., 22 Ch. D., 182 [1882].

[2] *Manjunath Badrabhat* v. *Venkatesh*, I. L. R., 6 Bom., 54 [1881], following *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*, I. L. R., 8 Calc., 51; L. R., 8 I. A., 123 [1881]. See *Nanda Rai* v. *Raghunandan Singh*, I. L. R., 7 All., 282 [1885]; *Bandey Karim* v. *Romesh Chunder*, I. L. R., 9 Calc., 65 [1882]; *Kashinath Morsheth* v. *Ramchandra*, I. L. R., 7 Bom., 408 [1883].

[3] I. L. R., 6 All., 269; L. R., 11 I. A., 37 [1883]. See *Kali Mundul* v. *Kadar Nath Chuckerbutty*, 6 C. L. R., 215 [1880]; *Hurrosoondary Dassee* v. *Jugobundhoo Dutt* I. L. R., 6 Calc., at p. 206 [1880]; *Beni Ram* v. *Nanhu Mal*, I. L. R., 7 All., 102; L. R., 11 I. A., 181 [1884].

[4] *Sheik Budan* v. *Ramchandra Bhujgaya*, I. L. R., 11 Bom., 537 [1887], citing *Langmead* v. *Maple*, 18 C. B. (N. S.), 255 [1865]; *Jenkins* v. *Robertson*, L. R., 1 H. L., 117 [1867]. See *Vithal Janardan* v. *Vithojirav*, I. L. R., 6 Bom., 586 [1882]; *Gopal Hanmant* v. *Kondo Kashinath*, I. L. R., 9 Bom., 329 (332) [1884].

[5] *Delhi and London Bank* v. *Orchard*, I. L. R., 3 Calc., 47; L. R., 4 I. A., 127 [1877]

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The Allahabad Court has laid down the following rule :—

When an execution case is struck off the file or is dismissed upon a ground other than a distinct finding that the decree is incapable of execution, or that the decree-holder's right is barred by limitation, or by any other law, or on some ground touching the merits, its dismissal whether termed as dismissal for default, or as struck off the file, does not operate to bar a fresh application for execution.[1]

In *Thakur Pershad* v. *Sheikh Fakirullah*[11] the Privy Council have recently held that section 647 of the Code does not on its true construction (independently of Act VI of 1892), prohibit an application for execution, where a former application has been withdrawn without liberty to present a fresh one.[2]

It is not competent to a Court executing a decree to decide a question of legitimacy. In *Abedunnissa* v. *Amirunnissa*[3] the Judicial Committee construed section 11 of Act XXIII of 1861, which corresponds with section 244 (*c*) of the present Code, with the exception of the words "or their representatives."

The conclusiveness of orders passed by an execution Court must now, it is conceived, depend upon whether such orders are within the jurisdiction defined in section 244 of the Code.

Act XIV of 1882, s. 244, is to be construed liberally.

Section 244 specifies the questions which are to be determined by order of the Court executing and not by a separate suit. It has further been held that section 244 (*c*) should be construed liberally so as to prevent litigation.[4] In *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*[5] the Judicial Committee observed : "It is of the utmost importance that all objections to execution-sales should be disposed of as cheaply and speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244." Any further examination of this subject does not fall properly within the scope of any work treating of estoppels.

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followed in *Hurrosoondary Dassee* v. *Jugobundhoo Dutt*, I. L. R., 6 Calc., 203 [1880].

[1] *Dhonkal Singh* v. *Phakkar Singh*, I. L. R., 15 All., 84 [1893]; *Tirthasami* v. *Annappayya*, I. L. R., 18 Mad., 131 [1894]; *Hajrat Akramnissa Begam* v. *Valiulnissa Begam*, I. L. R., 18 Bom., 429 [1893].

[2] L. R., 22 I. A., 44 [1894].

[3] I. L. R., 2 Calc., 327 ; L. R., 4 I. A., 66 [1876].

[4] *Punchanun Bundopadhya* v. *Rabia Bibi*, I. L. R., 17 Calc., 711 [1890].

[5] L. R., 19 I. A., 166 (169) [1892].

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CHAPTER III.

Parties, Privies and Representatives.

Res judicata between parties and those claiming under them—Evidence Act, ss. 40—44—Classification of persons affected by the Judgment—Property and not personal relation the ground of privity—Fraud of one of the parties or of both the parties—Collusive decrees—The question is what persons are to be held as claiming through or represented by the parties—Decree against Hindu widow binds reversionary heirs—She represents the estate—Kurta of Hindu family—Rule suggested in *Gaa Savant* v. *Narayan* [1883]—Shebait represents the idol—Holder of service vatan—Karnavan of Malabar tarwad—Karnam—Dharmakarta—Trustee—Manager—Guardian—Decree against benamidar binds real owner—Purchasers—Mortgagor and mortgagee—Landlord and tenant—Receiver—Different titles—Abatement—Res judicata, though other parties may be added in second suit or former parties may have occupied different positions—But not where subsequent decision is not between the parties or those claiming under them—Representatives made parties under protest—Suit not revived against—Res judicata between co-defendants—Statements of the rule in England—Rule stated in India—Applications of the rule—No res judicata by inference—Pro formâ defendant—Effect of non-appearance—Res judicata in the case of joint contractors and joint wrong-doers—Rule applied in India—Rule otherwise where joint and several liability—Madras—Bombay—Private rights claimed in common—Scope and meaning of explanation V—Is the Explanation to be read with s. 30?

The effect of the Judgment of a competent Court has next to be considered.

Res judicata between parties and those claiming under them.

In the case of *Gujju Lall* v. *Futteh Lall*,[1] a Full Bench of the Calcutta High Court held that a former judgment, which is not a judgment in rem, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit either as a res judicata, or as proof of the particular point which it decides, except between the same parties or those claiming under them. Unless the above condition is fulfilled, such a judgment cannot be taken as evidence, and it is not admissible either as a 'transaction under section 13 of the Evidence Act, or as a 'fact' under section 11 of that Act, which sections do not professedly relate to judgments at all.

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[1] I. L. R., 6 Calc., 171 [1880]. See *Naranji Bhikabhai* v. *Dipaumed*, I. L. R., 3 Bom., 3 [1878].

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Evidence Act, ss. 40—44.

Section 40 of the Evidence Act admits as evidence all judgments *inter partes* which would operate as res judicata, section 41 refers to judgments in rem, and section 42 relates to judgments upon public matters relevant to the inquiry.

Classification of persons affected by the judgment.

Section 13 of the Code does not, however, in express terms mention the case of *persons represented by, but not claiming through*, the parties to the former suit.[1]

Persons other than the parties to a suit are divided, in a recent Bombay case,[2] into three classes with reference to their position as affected by the judgment :—

Privies.

(*a*) Persons *claiming under* the parties to the former suit, or in the language of the English law, privies to those parties.[3]

Representatives.

(*b*) Persons not claiming under the parties to the former suit, but *represented* by them therein ; as for instance, persons interested in the estate of a testator or intestate *in relation to* the executor or administrator, shareholders in a Company in relation to the registered officer of the Company, members of a joint undivided family in relation to a member who has sufficiently represented their interests in a former suit.

Personal relation.

(*c*) Strangers, who are neither privies to, nor represented by, the parties to the former suit.

Property and not personal relation the ground of privity.

"In the law of estoppel," says Mr. Bigelow, "one person becomes privy of another, (1) by succeeding to the position of that other as regards the subject of the estoppel, (2) by holding in subordination to that other. . . . But it should be noticed that the ground of privity is *property* and not personal relation. To make a man a privy to an action, he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party subsequently to the action, or he must hold property subordinately." As an illustration of the former

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[1] See *Badri Narain* v. *Jai Kishen Das*, I. L. R., 16 All., 483 [1894] for a discussion upon the terms "representative" and "legal representative."

[2] *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, I. L. R., 6 Bom., 703 (709) [1882].

[3] *Whittingham's case*, Co. Rep., Pt. VIII, 42*b*, 45 Eliz. :—"It is to be known that there are three manner of privities : *scil*, privity in blood ; privity in estate : and privity in law. Privies in blood are meant of privies in blood inheritable, and that is in three manners, *sc.* inheritable as general heir ; inheritable as special heir, and inheritable as general and special heir. Privies in estate are, as joint tenants, husband and wife, donor and donee, lessor and lessee, &c. Privies in law are, where the law without blood or privity of estate, casts the land upon one, or makes his entry lawful ; as the lord by escheat, &c."

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class, the case of an assignee or a grantee is mentioned, who are not estopped by a judgment against the assignor or grantor obtained after the assignment or grant, the case of landlord and tenant being cited as an illustration of privity by subordination. And that learned author states that in the former class of cases a judgment obtained by fraud is binding, whereas in privity by subordination the privy, having generally taken for value, would not be barred by fraud of the party to a collusive judgment.[1]

Fraud

It is now necessary to consider the conclusiveness of former judgments with reference to the ground of fraud.[2] The effect of such judgments, with reference to the capacity of the above classes of persons to dispute them, was stated in the following terms in the case of *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*.[3]

A decree honestly obtained binds parties, privies, and representatives. Strangers are in no way affected by such a judgment, unless it be the judgment in rem of a competent Court.

of one of the parties

Where a decree has been obtained by fraud of *one* of the parties, it is only binding on the parties, their privies and representatives, so long as it remains in force. As soon as the fraud is proved, it may be impeached and set aside. And the same rule applies to strangers as regards judgments in rem. In the words of Latham, J., "There has been a real battle, but a victory unfairly won.[4]

or of both the parties.

Where a decree has been obtained by the fraud and collusion of *both* the parties there is authority to shew that it is binding upon the parties themselves and apparently upon their privies also. "In this case," to quote again from the above case, "there has been no battle, but a sham fight, '*Fabula, non judicium, hoc est; in scenâ, non in foro, res agitur*,' to cite from the celebrated argument of Mr. Solicitor Wedderburn in the *Duchess of Kingston's case*. As between the parties to such a judgment I apprehend that it is binding; and that, as Willes, C. J., said in *Prudham* v. *Phillips*,[5] 'if both parties colluded, it was never known that one of them

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[1] Bigelow on Estoppel, 5th ed., 142—144.

[2] *See* the Evidence Act (I of 1872), s. 44; and Act IX of 1872, s. 17, for a definition of fraud. *See* Act XV of 1877, Sch. II, Art. 95, for the period of limitation (three years). The method of procedure is by suit, or review of judgment. See *Aushootosh Chandra* v. *Tara Prasanna Roy*, I. L. R., 10 Calc., 612 [1884], and cases there cited.

[3] I. L. R., 6 Bom., 703 (710). *See* the observations at p. 715 upon s. 44 of the Evidence Act.

[4] *See* the observations of the learned Judge and the authorities cited at p. 711 of the report.

[5] 2 Ambler, 763 [circ. 1775].

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could vacate it.' The same rule will, I think, though I can find no express authority on the subject, apply as between the privies of these parties; except probably where the collusive fraud has been on a provision of law enacted for the benefit of such privies." Privies.

As regards persons represented by but not claiming through the parties to the former suit[1] and, in the case of judgments in rem,[2] strangers, it was held in the case now cited, that judgments obtained by the fraud or collusion of the parties may be treated as a nullity, upon the fraud and collusion being clearly established. Representatives.

With regard to decrees obtained by the fraud and collusion of the parties in order to defeat the rights of third persons, the opinion appears to be in Bombay that such decrees are binding.[3] The question is to be determined upon the principles discussed in the Chapters on Benami Transactions and Estoppel by Matter in Writing.[4] Are the parties to a collusive decree allowed as between themselves to shew the truth?

The general rule that, in the absence of fraud, an adjudication is binding only upon the parties to a suit or persons claiming under or represented by them, requires illustration, the main difficulty being as to what persons are to be held as claiming through or represented by the parties. The principal cases which arise in India will be here presented. The question is what persons are to be held as claiming through or represented by the parties.

A decree against a Hindu widow, properly obtained, binds the reversionary heirs, the whole estate being for the time vested in her for a life interest. In *Katama Natchiar* v. *Srimut Rajah Moottoo*,[5] a daughter sued to recover her father's estate, claiming to succeed to it on his death on the ground that the property was her father's self-acquired property. The defendant pleaded in bar a decree made in a suit by the widow claiming the same estate in preference to her husband's nephew on the ground that the family was divided. It was held that the judgment in the former suit Decree against Hindu widow binds reversionary heirs.

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[1] See *Bandon, Earl of* v. *Becher* [3 Cl. & F., 497 (1835)]; *Phillipson* v. *Earl of Egremont* [6 Q. B., 587 (1844)]; *The Queen* v. *Saddler's Co.* [10 H. L. Cas., 431 (1863)].

[2] As to judgments in rem, see *Meddowcroft* v. *Huguenin* [4 Moo. P. C., 386 (1844)]; *Perry* v *Meddowcroft* [10 Beav., 122 (137) 1846]; *Harrison* v. *Mayor of Southampton* [4 DeG. M. & G., 137 (1853)], cited in *Ahmedbhoy* v. *Vulleebhoy*.

[3] See *Chenvirappa* v. *Puttuppa*, I. L. R., 11 Bom., 708 [1887], and the cases there discussed, pp. 719—723.

[4] See *Param Singh* v. *Lalji Mal*, I. L. R., 1 All., 403 [1877]. *See* pp. 84—89, 262—266, *supra*.

[5] 9 Moo. I. A., 539 [1863]. See *Jugul Kishore* v. *Jotendro Mohun Tagore*, I. L. R., 10 Calc., 985; L. R., 11 I. A., 66; *Hari Nath Chatterjee* v. *Mothur Mohun Goswami*, I. L. R., 21 Calc., 8 [1893].

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determined only an issue between the parties and did not bind the daughter. The Judicial Committee, however, with reference to the representative character of a Hindu widow, observed:[1] "The whole estate would for the time being be vested in her, absolutely for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail[2] representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

She represents the estate.

A Hindu widow, therefore, succeeding to her husband's estate as heir represents the estate fully, and reversioners claiming to succeed after her are bound by decrees relating to her husband's estate obtained against her without fraud or collusion. The above rule is established by numerous decisions.[3]

Nominal party to suit.

In *Pertabnarain Singh* v. *Trilokinath Singh*,[4] the plaintiff claimed to have his right declared to a talukdari in Oudh by virtue of his having been appointed under a power of appointment given by a will said to have been executed by the last talukdar, whereby power was given to his widow to nominate a successor. In a previous suit by the widow, to which the plaintiff, being then a minor, was only nominally a party, the same issues were raised, and it was held by the Judicial Committee that the will had been revoked and that there was an intestacy. Their Lordships of the Privy Council held that the plaintiff was estopped by the order made in the former suit; the widow, holding an estate at least as large as that of a Hindu widow in her husband's property, fully represented that property in the former suit, and the appointment made by her was

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[1] 9 Moo. I. A., 604 [1863].

[2] In *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, 8 Moo. I. A., 500 [1861], the expression 'tenant in tail' is stated to be calculated to mislead as applied to a Hindu widow.

[3] *Nobin Chunder Chuckerbutty* v. *Guru Pershad Doss*, B. L. R., Sup. Vol., 1008; 9 W. R., 505 [1868]; *Nand Kumar* v. *Radha Kuari*, I. L. R., 1 All., 282 [1876]; *Sant Kumar* v. *Deo Saran*, I. L. R., 8 All., 365 [1886]; *Sachit* v. *Budhua Kuar*, I. L. R., 8 All., 429 [1886]; *Adi Deo Narain Singh* v. *Dukharan Singh*, I. L. R., 5 All., 532 [1883]. See *Chukkun Lal Roy* v. *Lolit Mohun Roy*, I. L. R., 20 Calc., 906 (924) [1893], where the widow did not represent the estate, and the will and codicil were not construed in the former suit.

[4] I. L. R., 11 Calc., 186; L. R., 11 I. A., 207 [1884].

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such as could only operate on her death. The plaintiff, therefore, upon the authority of the *Shivagunga case*[1] was privy to the former suit, and was bound by the order made in that suit.

Exception.

The reversioners, however, may contest a decree obtained against them while occupying a different capacity,[2] and may set aside an agreement made between the life-tenant and the grantee of her interest.[3]

Kurta of Hindu family, authority of.

The manager of a joint Hindu family, suing or being sued, acts in a representative capacity. Where, therefore, the interest of a joint and undivided family being in issue, one member of the family has prosecuted or defended a suit, such a decree may afterwards be considered as binding upon all the members of the family, their interest being sufficiently represented in the suit,[4] and the presumption being that he is acting for the family.[5]

Rule suggested in Gan Savant *v.* Narayan [1883].

In the case last cited the manager of a joint family obtained a decree for redemption of certain property in the year 1858 which was never executed. Another member of the family, who was a minor at the time of the first suit, subsequently brought a suit for redemption in 1878. The Bombay Court held that the second suit was barred, no fraud or collusion being shewn in the first suit. "As the law stands now," observed West, J., "a plaintiff suing in a representative character must set it forth, and shew that he is qualified to fill it.[6] When a right is claimed in common for the plaintiff and others, all persons interested may be deemed to be claimants, and thus bound by the result of the suit.[7] The present strictness and elaboration of procedure did not prevail in 1856. It was a generally received doctrine that the acts of a manager bound a Hindu family so long as they were honestly intended for its benefit, or were such as might reasonably be deemed to have that character. The Hindu family was, in fact, considered as a corporation whose interests were necessarily centred in the manager;

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[1] 9 Moo. I. A., 539 [1863].

[2] *Ram Chunder Poddar* v. *Hari Das Sen*, I. L. R., 9 Calc., 463 [1882].

[3] *Mussamut Raj Kunwar* v. *Mussamut Indirjit Kunwar*, 5 B. L. R., 585 [1870].

[4] *Jogendro Deb Roykut* v. *Funindro Deb Roykut*, 14 Moo. I. A., 376; 11 B. L. R., 244; 17 W. R., 104 [1871]. See *Gan Savant Bal Savant* v. *Narayan Dhond Savant*, I. L. R., 7 Bom., 467 [1883]; *Naryan Gop Habbu* v. *Pandurang Ganu*, I. L. R., 5 Bom., 685 [1881]; *Khub Chand* v. *Narain Singh*, I. L. R., 3 All., 812 [1881].

[5] *Gan Savant Bal Savant* v. *Narayan Dhond Savant*, ubi supra.

[6] *See* Act XIV of 1882, s. 50.

[7] *See* Act XIV of 1882, s. 13, Expl. 5. But this provision refers to a *private* right. See *infra*, p. 322.

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while the manager, as the chief member of the family, was understood to represent the common interests whenever these were subject to be affected by transactions in which he was engaged even in his own name. Union and undivided interest being the rule, the presumption was that a manager was acting for the family, unless it were made out that he acted, and professed to act, for himself alone."

Old practice.

New practice.

According to the former practice, in a suit filed by or against a Hindu as manager, it was seldom or never set forth specifically that he sued or was sued on behalf of the family, the intimacy of union being taken for granted, and this practice is recognised in the passage above quoted from *Jogendro Deb Roykut* v. *Funindro Deb Roykut*;[1] but section 50 of the Code now requires a plaintiff suing in a representative character to shew that he has taken the steps necessary to enable him to support that character. And it would seem that a plaintiff seeking to charge the members of a joint family should either make them parties, or implead the manager in his representative character.[2] Where, however, the members of a family, though not parties, have treated the manager as conducting the previous litigation as their representative and on their behalf, the decision will of course bind them in a subsequent suit upon the same matter.[3]

Estoppel by conduct.

Shebait may incur debts and represent the idol in litigation.

Where a shebait has incurred debts in the service of an idol for the benefit and preservation of its property, his position is analogous to that of a manager for an infant heir,[4] and decrees properly obtained against him in respect of debts so incurred are binding upon succeeding shebaits, who in fact form a continuing representation of the idol's property.[5] "If," observed the

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[1] 14 Moo. I. A., 376. *See* the observations of West, J., in I. L. R., 7 Bom. at pp. 470, 471.

[2] See *Ittiachan* v. *Velappan*, I. L. R., 8 Mad., 404 (487) [1885], observing upon *Bissessur Lall Shaoo* v. *Maharaja Luchmessur Singh*, L. R., 6 I. A., 233 (237) [1879].

[3] See *Ram Narain* v. *Bisheshar Prasad*, I. L. R., 10 All., 411 [188], observing upon *Narayan Gup Habbu* v. *Pandurang Ganu*, I. L. R., 5 Bom., 686 [1881].

[4] See *Hunooman Persaud Panday* v. *Mussamut Babooee Munraj Koonweree*, 6 Moo. I. A., 393 (423) [1856].

[5] *Prossunno Kumari Debya* v. *Golab Chand Baboo*, L. R., 2 I. A., 145 (152) [1875]. *See* 20 W. R., 86, for this case in the lower Court: *Juggut Chunder Sein* v. *Kishennund*, 2 Sel. Rep., 126 [1815]; *Kissnowmai Ashrom Dundy* v. *Nursingh Doss Byragee*, 1 Marsh., 485 [1863]; *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*, 13 Moo. I. A., 270 (275) [1869]. See *Sashi Bhusan Guha* v. *Gogan Chunder Shaha*, I. L. R., 22 Calc. at p. 372 [1894].

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Judicial Committee, "such debts, and the judgments founded upon them, were not held to be thus binding on successors, the consequence would be that no shebait would be able to obtain assistance in times of need." In respect of such debts he fully represents the estate in litigation.

Holder of service vatan lands.

So in the absence of fraud and collusion a judgment against one holder of service vatan lands is res judicata as regards a succeeding holder.[1]

Karnavan of Malabar tarwad.

A decree against the karnavan of a Malabar tarwad may in some cases bind the members. Previous to the Full Bench decision of the Madras Court in *Ittiachan* v. *Velappan*,[2] it was considered that the karnavan might sue alone on behalf of, and might be impleaded alone as representing, the tarwad,[3] and a decree obtained against a karnavan not impleaded as such or even sued in a representative character was considered to bind the tarwad.[4] It was pointed out, however, in *Kombi* v. *Lakshmi*[5] that in order to bind the members of the tarwad the proper procedure was to implead them, though in cases in which the members were numerous one or more of them might be permitted to represent the others under the provisions of section 30 of the Code. The Full Bench decision now lays down the rule that where a decree has been obtained for a debt binding on the tarwad, tarwad property cannot be proceeded against in execution unless the karnavan has been, in the suit, impleaded as such, or it is shewn on the face of the proceeding that it was intended to implead him in his representative character. And even where such intention is apparent, members of the tarwad, who are not parties to the proceedings and have not been represented under section 30, are not estopped from shewing that the debt for which the decree was passed was not binding on them.

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[1] *Radhabai* v. *Anantrav*, I. L. R., 9 Bom., 198 [1885], where the subject is exhaustively discussed.

[2] I. L. R., 8 Mad., 484 [1885]. See *Sri Devi* v. *Kelu Eradi*, I. L. R., 10 Mad., 79 [1886]; *Shankaram* v. *Kesavan*, I. L. R., 15 Mad., 6 [1891]; *Komappan Nambiar* v. *Ukkaran Nambiar*, I. L. R., 17 Mad., 214 [1893].

[3] *Varanakot Narayan Namburi* v. *Varanakot Narayan Namburi*, I. L. R., 2 Mad., 328 [1880].

[4] See *Ittiachan* v. *Velappan*, at p. 486.

[5] I. L. R., 5 Mad., 201 [1881]. See *Vasudevan* v. *Narayanan*, I. L. R., 6 Mad., 121 [1882]; *Thenju* v. *Chimmu*, I. L. R., 7 Mad., 413 [1884]; where fraud or breach of duty on the part of the karnavan is proved, his acts will not bind the tarwad.—*Haji* v. *Atharaman*, I. L. R., 7 Mad., 513 [1883].

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Karnam.

A decree in a suit by the karnam of a certain *mitta* to recover land as part of the mirasi property attached to his office was held to be binding upon his successor.[1]

Dharmakarta.

In a suit by one claiming as the *dharmakarta* of a *devasthanam* against the purchaser of certain land at a sale held in execution of a decree against a former *dharmakarta* who had been removed from his office, it was held that the plaintiff was not estopped by his failure in a previous suit (to which the defendant was no party) to establish his claim to the dharmakartaship.[2]

Illam sufficiently represented by trustee.

One of five trustees in whom the *uraima* right over a certain *devasam* was vested, was held estopped by a decree in a suit brought by another trustee, on the ground that he must be deemed to have claimed under the latter within the meaning of Explanation 5 of section 13 of the Code.[3]

Manager.

In *Kamaraju* v. *The Secretary of State for India*,[4] the decision of a Forest Settlement Officer upon an enquiry held under the Boundary Act of 1860, at which enquiry the plaintiff (then a minor) was represented by a manager of his estate appointed under section 8 of Regulation V of 1804, was held res judicata in a suit to recover the land.

Guardian of minor.

Section 2 of Act XL of 1858 enacts with reference to minors in Bengal that every person who shall claim a right to have charge of property in trust for a minor under a will or deed or by nearness of kin or otherwise may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims charge until he shall have obtained such certificate.

Manager of estate.

A manager of an estate who has obtained such a certificate is therefore the guardian of infant co-proprietors and represents them fully in suits for money advanced in reference to the estate.[5]

In *The Collector of Monghyr* v. *Hurdai Narain Shahai*,[6] the fact that the plaintiff, a minor, had through his guardian actively intervened in proceedings to set aside a sale of property in

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[1] *Venkayya* v. *Suramma*, I. L. R., 12 Mad., 235 [1889]. See *Babaji* v. *Nana*, I. L. R., 1 Bom., 535 [1876].

[2] *Ramalingam* v. *Thirugnana*, I. L. R., 12 Mad., 312 [1889].

[3] *Madhavan* v. *Keshavan*, I. L. R., 11 Mad., 191 [1887].

[4] I. L. R., 11 Mad., 309 [1886].

[5] *Doorga Persad* v. *Kesho Persad Singh*, L. R., 9 I. A., 27 [1882].

[6] I. L. R. 5 Calc., 425 [1879].

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which he and his father were jointly interested as members of a Mitakshara family, was held to be no bar to a suit to recover the property, the purchaser having at the sale acquired the interest of the father only.

Decree against benamidar binds rea owner.

A decree properly obtained by or against a benamidar is binding upon the real owner, the presumption being that the benamidar instituted the suit with his authority and consent. In *Gopi Nath Chobey* v. *Bhugwat Pershad*,[1] Mitter, J., observed: "It appears to us, so long as the benami system is to be recognised in this country, the proper rule in our opinion is that, in the absence of any evidence to the contrary, it is to be presumed that the benamidar has instituted the suit with the full authority of the beneficial owner; and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself." In *Khub Chand* v. *Narain Singh*,[2] one Ganesh sold an estate to the defendant's minor son benami for the defendant who brought a suit for redemption in his minor son's name against the plaintiff, the mortgagee. It was held in that suit that the sale by Ganesh was invalid. Ganesh subsequently redeemed the estate and sold it a second time to the defendant. In a suit to set aside the sale it was held that the question was res judicata, inasmuch as the defendant though not in name was in fact a party to the former suit in which the same point had been finally decided. In such cases the real owner may not, after standing by, assert his secret title.[3]

Purchaser.

A purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against his vendor commenced after the purchase.[4]

Pending suit.

A purchaser *pendente lite* from one of the parties to a suit is held to claim through his vendor and cannot go behind a decree obtained against his vendor.[5]

Auction-purchaser does not claim through defaulting proprietor.

The position, however, of an auction-purchaser at a sale for arrears of Government revenue enjoys certain privileges conferred

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[1] I. L. R., 10 Calc., 697 (705) [1884].

[2] I. L. R., 3 All., 812 [1881]. See *Bhawabal Singh* v. *Maharaja Rajendra Pratap Sahoy*, 5 B. L. R., 321 [1870]; *Prosono Coomar Pal Chowdhry* v. *Koylash Chunder Pal Chowdhry*, B. L. R. (F. B.), 759 [1867].

[3] *Shangara* v. *Krishnan*, I. L. R., 15 Mad., 267 [1889].

[4] *Mercantile Investment, &c., Co.* v. *River Plate, &c., Co.*, L. R., '94, 1 Ch., 578.

[5] *Hukm Singh* v. *Zauki Lal*, I. L. R., 6 All., 506 [1884].

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by the revenue sale law.[1] He is not privy in estate to the defaulting proprietor. He does not derive his title from him, and is bound neither by his acts nor his laches nor by any limitation which would not affect the Government.[1] In a suit, therefore, by an auction-purchaser against the defaulting proprietor, proceedings between the latter and third parties with respect to the title to the land are no evidence against the plaintiff.[2] The

Purchaser of putni.

purchaser of a putni tenure sold at the suit of the landlord can, however, only acquire rights higher than an ordinary purchaser by private contract to the precise extent to which such privileges are conferred by express terms of law.[3]

Mortgagor and mortgagee.

A decree against a mortgagor will not bind a mortgagee whose title arose prior to the suit to which he was not a party.[4] In *Bonomalee Nag* v. *Koylash Chunder Dey*,[5] it was held that a mortgagee in possession, suing for a declaration that a right of way did not exist, was not bound by a decision in a suit between the mortgagor and a third party of which he had no knowledge, as the mortgagor did not represent the entire estate. These decisions proceed upon the principle that the ground of privity is property and not personal relation.[6] After a mortgage has been created the mortgagor, in whom the equity of redemption alone is vested, no longer possesses any estate entitling him to represent the interest of the mortgagee in subsequent litigation.[7]

The cases are collected in *Soshi Bhusan Guha* v. *Gopan Chunder Shaha*.[8]

In *Karuthasami* v. *Jaganatha*,[9] a mortgagor obtained a decree for redemption which was not executed, and subsequently sold the equity of redemption to the plaintiff who sued the mortgagee for

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[1] *Radha Gobind Koer* v. *Rakhal Das Mukherji*, I. L. R., 12 Calc., 82 [1885]. See *Goluckmonee Dossee* v. *Huro Chunder Ghose*, 8 W. R., 62 [1867]; *Kooldeep Narain Singh* v. *Government of India*, 11 B. L. R. (P. C.), 71 [1871]; *Boykuntonath Chatterjee* v. *Ameeroonissa Khatoon*, 2 W. R., 191 [1865].

[2] *Buzlool Rahaman* v. *Pran Dhan Dutt*, 8 W. R., 222 [1867].

[3] *Taraprasad Mittra*, v. *Ram Nrising Mittra*, 6 B. L. R., Ap. 5; 14 W. R., 283 [1870], observed upon in *Radha Gobind Koer* v. *Rakhal Das Mukherji*, I. L. R., 12 Calc., at p. 90.

[4] *Sita Ram* v. *Amir Begum*, I. L. R., 8 All., 324 [1886]; *Dooma Sahoo* v. *Jomaroo Loll*, 12 W. R., 362 [1869].

[5] I. L. R., 4 Calc., 692 [1878].

[6] *See* Bigelow on Estoppel, 5th ed., 182.

[7] *See* I. L. R., 8 All., at p. 338.

[8] I. L. R., 22 Calc., 364 (371) [1894].

[9] I. L. R., 8 Mad., 478 [1885]. See *Sami Achari* v. *Somasundram*, I. L. R., 6 Mad., 119 [1882]; *Roy Dinkur Doyal* v. *Sheo Golam Singh*, 22 W. R., 172 [1874]; *contra see Anrudh Singh* v. *Sheo Prasad*, I. L. R., 4 All., 481 [1882]; *Gan Savant* v. *Narayan Dhond Savant*, I. L. R., 7 Bom., 467 [1883].

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redemption. It was held that the suit was not barred by the former decree, as the relation of mortgagor and mortgagee had not been terminated, and the right to redeem was inseparable from the relation so long as it existed.

In a Bombay case, however, it was held that a decree for redemption, on the default of the decree-holder to pay the money declared to be due within the time fixed or the time allowed by law for execution, operates as a judgment of foreclosure debarring the mortgagor, or a purchaser from him of the equity of redemption, from bringing a second suit to redeem.[1]

Landlord and tenant.

A lessor cannot, within the meaning of section 13 of the Code, be said to claim under his own lessee. In *Rambrohmo Chuckerbutti* v. *Bunsi Kurmokar*,[2] an ejectment suit by a landlord was held not to be barred by the dismissal of a previous suit by a tenant against the same defendant in respect of the same land. So in *Ram Narain Rai* v. *Ram Coomar Chunder Poddar*,[3] decrees obtained against the registered tenants of a tenure were held inadmissible in evidence against the real owner of the tenure who was not a party to the suits in which the decrees were obtained and who did not claim through the parties against whom the decrees were passed. And a suit by a lessor against a raiyat to set aside a pottah is not barred by the fact that the pottah has been declared genuine in a suit by the plaintiff's ticcadar against the same defendant.[4]

Receiver.

A suit by one member of a family to recover his own share of certain property having been dismissed on the ground that his father was alive and capable of inheriting, it was held that such a decision was no bar to a suit by the Receiver in the name of the whole family to recover the whole property.[5]

Different titles.

In *Ahmad Hossein Khan* v. *Nihaluddin Khan*,[6] a suit against an elder brother for maintenance was held by the Privy Council not to be barred by a previous order made upon other grounds dismissing a claim for maintenance against the father. The

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[1] *Gan Savant Bal Savant* v. *Narayan Dhond Savant*, I. L. R., 7 Bom., 467.

[2] 11 C. L. R., 122 [1882]. *See* the observations in *Brojo Behari Mitter* v. *Kedar Nath Mozumdar*, I. L. R., 12 Calc., 580 [1886].

[3] I. L. R., 11 Calc., 562 [1885].

[4] *Shaikh Wahid Ali* v. *Nauth Tooraho*, 24 W. R., 128 [1875].

[5] *Juggunnath Pershad Dutt* v. *Mr. C. S. Hogg*, 12 W. R., 117 [1869].

[6] I. L. R., 9 Calc., 945 [948]; L. R., 10 I. A., 45 [1883].

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adjudication in the previous suit was not between the brothers but between the plaintiff and his father, and was based upon a different sort of claim.[1] In *Ruder Narain Singh* v. *Rup Kuar*,[2] the plaintiff suing as next heir to his uncle was held not to be barred by a decision against his father inasmuch as he claimed under a title not derived from his father.

Abatement.

In *Nistarini Debi* v. *Brojo Nath Mookopadhya*,[3] mortgaged property was sold in execution of a decree against the mortgagor and was purchased by the decree-holder. The mortgagee sued upon his mortgage, making the purchaser a defendant ; but the latter died pending suit, and the suit was not revived against his representatives. The mortgagee, however, obtained a decree, and the property was purchased in execution by the present plaintiff, who now sued to recover possession from the representatives of the former purchaser. The Court were of opinion that the mortgagee's suit would, under section 371 of the Code, have had the effect of res judicata, that suit having abated against the representatives.

Res judicata, although other parties may be added in second suit, or former parties may have occupied different positions.

When once it is clear that the same right and title has been substantially in issue in two suits an adjudication in the former will bind the same parties in the latter, although other persons may have been added as parties in the subsequent suit,[4] or though they may have occupied different positions on the record.[5]

In *Gopal Das* v. *Gopi Nath Sircar*,[6] a former suit against the defendant for rent was dismissed, the defendant alleging that H and J were his landlords. The plaintiff again sued the defendant for possession, making H and J parties. It was held, upon the authority of *Gobind Chunder Koondoo* v. *Taruck Chunder Bose*,[7] that the former decision being upon a question of title was conclusive between the parties, and the fact that in the second suit there

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[1] I. L. R., 9 Calc., 945 [948]; L. R., 10 I. A., 45 [1883].

[2] I. L. R., 1 All., 734 [1878].

[3] 10 C. L. R., 229 [1882]. The case was decided under Act VIII of 1859.

[4] In *Mokidin* v. *Muhammad Ibrahim*, 1 Mad. H. C., 245 [1863], Scotland, C. J., observed : "The Advocate-General contended that the fact of another name being introduced as a party distinguished the present case from others. But that cannot be so in this case. Otherwise every case of estoppel by judgment *inter partes* might be got rid of by introducing a man of straw as a plaintiff or defendant in the subsequent suit."

[5] See *Gobind Chunder Koondoo* v. *Taruck Chunder Bose*, infra; *Shadul Khan* v. *Amiaulla Khan*, I. L. R., 4 All., 92 [1881].

[6] 12 C. L. R., 38 [1882].

[7] I. L. R., 3 Calc., 145 ; 1 C. L. R., 35 [1877].

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were other parties was immaterial. In *Ananda Raman* v. *Paliyil Nanu*,[1] the defendant alleged in the first suit that he claimed under N, the plaintiff contending that he held as under-tenant to P, and the suit was dismissed. The plaintiff then sued the defendant and N. It was held that the first decision was no bar on the ground that no issue as to the defendant's title under N was decided in the former suit. The question in such cases would seem to be whether in the first suit an issue has been raised and finally decided or not.

But not where subsequent decision is not between the parties or those claiming under them.

In *Zamindar of Pittapuram* v. *Proprietors of Kolanka*,[2] the previous suit was by the plaintiff's father against the grandmother of the plaintiff, the father of the defendants, and the sister of their father, to restrain the grandmother from wasting property which had belonged to her husband by assigning it to her co-defendant ; but as regards the subject-matter of the second suit there was no distinct allegation in the pleadings of the first suit, nor anything to connect the defendant's father with it or to disclose any claim to it on the part of the plaintiff, thes uit being substantially to restrain waste. In the second suit the plaintiff sought to recover possession of property mentioned in the plaint in the first suit, stating that it had belonged to his grandmother, and that on her death the defendants had taken wrongful possession. The Judicial Committee held that the decision in the former suit was not a decision in a suit between the same parties or parties under whom they claim, establishing the right of the defendants in the former suit to the property in question in the present suit, and that the cause of action in the present suit was not determined in the former suit.

Representatives made parties under protest.

Where, without any issue being raised and tried, certain persons were made parties to a suit as representatives of the deceased defendant (a Hindoo widow), and they denied at the time that they were her representatives, it was held that they were competent to sue to have it declared that the decree in the former suit (being a mortgage decree) only covered the widow's life interest, and that their suit was not barred either as res judicata or under section 244 of the Code.[3] So, in a mortgage suit against the mortgagor

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[1] I. L. R., 5 Mad., 9 [1882].

[2] I. L. R., 2 Mad., 23 ; L. R., 5 I. A., 206 ; 3 C. L. R., 265 [1878].

[3] *Kanai Lall Khan* v. *Sashi Bhuson Biswas*, I. L. R., 6 Calc., 777 [1881]. See *Gourmoni Dabee* v. *Jagut Chundra Audhikari*, I. L. R., 17 Calc., 57 [1889].

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and A, a person who had purchased the right title and interest of the mortgagor, A having died before decree, and the suit not being revived against his representatives, it was held that the decree was not binding on the representatives, and that a second suit would lie as against them to recover the property.[1]

Suit not revived against.

Res judicata between co-defendants. Statements of the rule in England.

[1807.]

The subject of decrees between co-defendants and their effect has to be considered. In *Chamley* v. *Lord Dunsany*,[2] Lord Redesdale observed: "It seems strange to object to a decree because it is between co-defendants, when it is grounded on evidence between plaintiffs and defendants. It is a jurisdiction long settled and acted on, and the constant practice of Courts of Equity."[3] And Lord Eldon, in the same case, said: "Where a case is made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a Court of Equity is entitled to make a decree between the defendants. Further, my Lords, a Court of Equity is bound to do so. The defendant chargeable has a right to insist that he shall not be liable to be made a defendant in another suit for the same matter that may then be decided between him and his co-defendant. And the co-defendant may insist that he shall not be obliged to institute another suit."[4]

[1843.]

In *Cottingham* v. *Earl of Shrewsbury*,[5] Wigram, V. C., states the principle more concisely: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."[6]

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[1] *Bepin Behary Bundopadhya* v. *Brojo Nath Mookhopadhya*, I. L. R., 8 Calc., 357 [1882]. *See*, however, s. 371, Act XIV of 1882.

[2] 2 Sch. & Lef., 690 [1807]. See *Farquaharson* v. *Seton*, 5 Russ., 45 [1828].

[3] *Ib.*, 719.

[4] *Ib.*, 718.

[5] 3 Hare, 627 [1843].

[6] *Ib.*, 638; Jessel, M. R., in *Kevan* v. *Crawford*, L. R., 6 Ch. D., 29 [1877] says: "What right has a Court of Justice to investigate a claim by title paramount by one co-defendant against another? I am not aware of any. The answer is if you wish to assert these claims you must assert them in a proper action.....Where a plaintiff obtains relief against one or more defendants, and there are subordinate questions either necessary to be gone into to work out that relief completely for the benefit of the plaintiff, or necessary to adjust the rights of the defendants conse-

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The rule in *Cottingham* v. *Earl of Shrewsbury*[1] is stated in another form by West, J., in *Ramchandra Narayan* v. *Narayan Mahadev*[2]: "There must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be res judicata amongst the defendants, nor will it be res judicata amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group."[3] It is apprehended that the rule which is to be applied in this country is here correctly stated. Rule stated in India. [1886.]

The cases in which a decree has been held to be res judicata in this country among co-defendants require to be noticed.

In *Sheikh Khoorshed Hoosein* v. *Nubbee Fatima*,[4] it was held that a decree for partition is in the nature of a joint declaration of the rights of all the persons interested in the property, and is therefore binding upon co-defendants. Applications of the rule.

In *Shadal Khan* v. *Aminullah Khan*,[5] a question of legitimacy had been decided in a former suit in which the parties were co-defendants. On that occasion the present plaintiff had supported the cause of the then plaintiff as against the present defendant. It was held that, although the parties had in the former suit stood together in the same array, they had been in fact opposed to one another, and the question of legitimacy had been finally decided between them.

A similar case is *Bissorup Gossamy* v. *Gorachand Gossamy*.[6] The plaintiff had as defendant in a former suit supported the then plaintiff, his lessee, against the present defendant. It was held that the title to the mouzah was res judicata between the parties, upon the authority of *Govind Chunder Koondoo* v. *Taruck Chunder Bose*.[7] To the same effect is the case of *Venkayya* v. *Narasamma*,[8] the principle of decision being that where a matter in dispute in a suit has been the subject of active controversy between the parties

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quent on the relief so obtained by the plaintiff, the Court may by inquiries in chambers work out the equities between the co-defendants. But there is no case produced in which any such enquiries were directed where the plaintiff's case wholly failed."

[1] 3 Hare, 627.

[2] I. L. R., 11 Bom., 216 [1886].

[3] *Ib.*, 220.

[4] I. L. R., 3 Calc., 551 [1877].

[5] I. L. R., 4 All., 92 [1881].

[6] I. L. R., 9 Calc., 120 [1882].

[7] I. L. R., 3 Calc., 146 [1877].

[8] I. L. R., 11 Mad., 204 [1887]. See *Madhavi* v. *Kelu*, I. L. R., 15 Mad., 264 [1892].

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as co-defendants in a previous suit, they are precluded from re-agitating the same matter.

No res judicata by inference.

The rule is, however, different where the decision in the previous suit has been between the plaintiff and the defendants collectively, and the relief given to the plaintiff has not involved the decision of any question between the defendants *inter se*. In such a case there can be no res judicata by inference between the defendants.

In *Jumna Singh* v. *Kamar-un-nissa*,[1] a Full Bench of the Allahabad Court held that the finding, in a previous suit to enforce a right of pre-emption against the vendor and the purchaser as defendants, was between the plaintiff and the defendants collectively and did not preclude the purchaser from suing the vendor to establish the sale. The same Court held, in *Bhagwant Singh* v. *Tej Kuar*,[2] that the finding in a previous suit, in which the parties or those under whom they claimed were defendants, to the effect that a certain family was joint, was not a determination of the matter among the defendants *inter se*, and could only be res judicata as against the former plaintiff and those claiming under him.

Pro formâ and exparte defendant.

The case of a *pro formâ* defendant, and that of a defendant who does not appear, was considered by two Full Benches of the Calcutta High Court. In *Brojo Behari Mitter* v. *Kedar Nath Mozumdar*,[3] one Uma Churn brought a suit against the defendant to recover a tank claiming as tenant of one Brojo Behari, who was made a *pro formâ* defendant, and who supported the plaintiff's case. The suit was dismissed. Brojo Behari then sued the defendant for the same matter. The Court held that the suit was not barred, observing: "No doubt in the former suit the matter now in issue was also in issue and was formally determined, but that suit was not 'between the same parties' as this suit 'or between parties under whom the parties in this suit claim.' The plaintiff is the landlord of the plaintiff in the former suit, and cannot be barred by the decision of that suit, which was between his tenant, a third party, because he was joined as defendant with that party. It is sufficient to point out that the conduct of the suit was not in

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[1] I. L. R., 3 All., 152 [1880].

[2] I. L. R., 8 All., 91 [1885], distinguishing *Shadal Khan* v. *Aminullah Khan*, I. L. R., 4 All., 92.

[3] I. L. R., 12 Calc., 580 [1886].

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his hands." This decision has been dissented from in Madras, impliedly in *Chandu* v. *Kunhamed*,[1] and expressly in *Madhavi* v. *Kelu*.[2] In *Latchanna* v. *Saravayya*,[3] it was recently held, following *Chandu* v. *Kunhamed*, that the defendants must be taken as claiming under the plaintiff in a previous suit.

Effect of non-appearance.

In *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry*,[4] the parties were co-defendants in a previous suit brought by another co-sharer to recover rent from the present defendants. The present plaintiffs did not appear, and it was held that rent was payable as claimed. The plaintiffs then sued to recover their share of the rent. The Court held that the decree in the previous suit did not operate as res judicata, and was not admissible as evidence. Upon the first ground the Court observed : "We think it clear that no question of res judicata can possibly arise. The test is mutuality. If the former suit had been dismissed could it have been said that the now plaintiffs were barred. Apart from res judicata, the question whether the decree referred to was admissible in evidence is, we think, concluded by the two Full Bench cases.—*Gujju Lal* v. *Fatteh Lal*,[5] and *Brojo Behari Mitter* v. *Kedar Nath Mozumdar*."[6]

The Full Bench cases do not expressly recognise the distinction drawn in *Ramchandra Narayan* v. *Narayan Mahadev*.[7] It may be doubted whether their effect is not to weaken the rule of res judicata as between co-defendants, and the earlier cases in Calcutta are to the same effect.[8]

Res judicata in the case of joint contractors and joint wrong-doers.

The rule that a judgment obtained against one or more of several joint contractors or joint wrong-doers operates as a bar to a second suit against any of the others has been applied in this country. This rule was laid down in *King* v. *Hoare*[9] by Baron Parke in the Court of Exchequer and was followed in *Brinsmead* v.

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[1] I. L. R., 14 Mad., 325 [1891].
[2] I. L. R., 15 Mad., 264 [1892].
[3] I. L. R., 18 Mad., 164 [1894].
[4] I. L. R., 13 Calc., 352 [1886].
[5] I. L. R., 6 Calc., 171 [1880].
[6] I. L. R., 12 Calc., 580 [1886].
[7] I. L. R., 11 Bom., 216 [1886].
[8] See *Mudho Mokee Dabee* v. *Gunga Govind Mundle*, W. R., 1864, 299 ; *Ram Chand Sowardar* v. *Kala Chand Chuckerbutty*, 1 W. R., 287 [1864] ; *Madhoo Pershad* v. *Lallajee Shahoo*, 9 W. R., 557 [1868] ; *Kalee Kinker* v. *Kristo Mungul*, 11 W. R., 462 [1869] ; *Obhoy Churn Nundee* v. *Bhoobun Mohun Mojoomdar*, 12 W. R., 524 [1870] ; *Khelut Chunder Ghose* v. *Kishen Govind Deb*, 16 W. R., 128 [1871] ; *Nobin Chunder Dass* v. *Nim Chand Dass*, 17 W. R., 191 [1872] ; *Rameswur Ghose* v. *Azeem Joardar*, 17 W. R., 373 [1872] ; *Ain Alli* v. *Juggut Chunder Roy Chowdhry*, 25 W. R., 416 [1876].
[9] 13 M. & W., 494 [1844].

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Harrison[1] in the Exchequer Chamber, and by the House of Lords in *Kendall* v. *Hamilton*,[2] and rests upon the principle that where there is one cause of action, whether against one person or many, that cause of action is changed into matter of record by the judgment of a Court of record by the operation of merger.[3]

Rule applied in India.

The rule is first recognised in *Nuthoo Lall Chowdhry* v. *Shoukee Lall*,[4] where the plaintiffs, after electing to treat a bond as mortgaging the shares of two of the members of a family, and executing a decree against those shares, sued the other members of the family on the allegation that the loan was taken on their behalf. Couch, C. J., observed: "If there is a joint contract, not a joint and several but a joint contract, and that is all this can be, and a party sues upon it and gets judgment, he cannot bring a fresh suit against the persons who were jointly liable but were not included in the former suit."[5]

In a subsequent Calcutta case, *Hemendro Coomar Mullick* v. *Rajendro Lall Moonshee*,[6] the rule was stated to be one of principle and not merely of procedure, and section 43 of the Contract Act was held not to create a joint and a several liability in each case, but merely to allow the promisee to sue one or more of the promisors in one suit, thereby preventing the defendant from objecting that his co-contractors ought to have been sued with him. "There is," said Garth, C. J., "but one cause of action for the injured party in the case of either a joint contract or a joint tort; and that cause of action is exhausted and satisfied by a judgment being obtained by the plaintiff against all or any of the joint contractors or joint wrong-doers whom he chooses to sue."

It is pointed out in the case last cited, that the rule may operate to bar a creditor from pursuing his remedy against a debtor who is out of the jurisdiction.[7]

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[1] L. R., 7 C. P., 547 [1872].

[2] L. R., 4 Ap. Ca., 505 [1879]. *See* the recent case of *Hammond* v. *Schofield*, L.R., 1 Q.B., 91 (453), where the consent of the defendant (one of two joint contractors) to the setting aside the judgment, was held not to enable the plaintiff to sue the other joint contractor. *See* L.Q. R., 1891, p. 205.

[3] Where a cheque is given as a collateral security a judgment upon it does not extinguish the original debt. See *Wegg* v. *Prosser*, L. R., '95, 1 Q. B., 108, affirming L. R., '94, 2 Q. B., 101. The co-contractors ought all to be joined as defendants, see *Robinson* v. *Geisel*, L. R., '94, 2 Q. B., 685, and cases there cited.

[4] 10 B. L. R., 200 [1872], dissenting from *Ramnath Roy Chowdhry* v. *Chunder Sikhr Mohapatter*, 4 W. R., 50 [1865].

[5] 10 B. L. R., 204.

[6] I. L. R., 3 Calc., 353 [1878].

[7] *See* 19 & 20 Vict., c. 97, s. 11.

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Rule otherwise where joint and several liability.

The above cases were distinguished in *Dhunput Singh* v. *Sham Soonder Mitter*,[1] where the plaintiff, after suing some of his co-sharers in a putni for arrears of rent, discovered that they had sold their shares to the defendant. He applied unsuccessfully to have the defendant made a party to that suit, and subsequently sued him to recover arrears in proportion to his purchase, the former decree remaining unsatisfied meanwhile. The Court held that the relation between the defendant and his vendors gave rise to a separate liability, and that a decree against one of several joint and several promisors *without satisfaction* would not bar a second suit. In *Lawless* v. *Calcutta Landing and Shipping Co.*[2] a decision in a suit against a banian was held not res judicata in a suit for the same money against a manager, the liability not being joint but being based on distinct contracts.

Madras.

The doctrine has been applied and distinguished in Madras. In *Gurusami Chetti* v. *Samurta Chinna Mannar Chetti*,[3] the plaintiffs obtained a decree for a money debt against one Virargava, who with his infant sons constituted a joint trading family. Execution having issued against a certain property, the mother of the sons intervened and the attachment was raised. In a suit against the sons to obtain a declaration that the house was liable to attachment, it was held that the scope of the decree could not be extended so as to make the other coparceners liable, the cause of action being one and indivisible, and the plaintiffs having exhausted their remedy. In *Chockalinga Mudali* v. *Subbaraya Mudali*,[4] a creditor obtained a decree against a member of an undivided family in respect of certain property hypothecated by him, and attached the property, but on the other coparceners intervening their shares were released. The creditor then sued to have it declared that the shares released were liable to attachment, and proved that the debt had been incurred for purposes binding on the family. It was held that the coparceners not being parties to the former suit their shares could not be affected by the decree.

Bombay.

And in Bombay the rule has also been recognised. In *Lukmidas Khimji* v. *Purshotam Haridas*,[5] a decision upon section 43 of

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[1] I. L. R., 5 Calc., 291 [1879].
[2] I. L. R., 7 Calc., 627 [1881].
[3] I. L. R., 5 Mad., 37 [1881].
[4] I. L. R., 5 Mad., 133 [1882].
[5] I. L. R., 6 Bom., 700 [1882].

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the Contract Act, it was held that a plaintiff suing a firm may proceed against some of the partners, allowing his remedy against the others to be barred.

Where plaintiff has failed in a suit against one of several joint debtors.

Conversely, a judgment recovered by one of several joint debtors cannot be pleaded as a defence to a subsequent action against the other joint debtors in respect of the same cause, unless the plea shews that the judgment was recovered on a ground which operated as a discharge of all.[1]

Private rights claimed in common.

Explanation V to section 13 provides that where persons litigate *bonâ fide*, in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

Kalishunker Doss v. Gopal Chunder Dutt [1880].

It has been held in Calcutta that the explanation applies only to cases where several different persons claim an easement or other right by one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land or to take water from the same spring or well.[2] In the case now cited Gopal Chunder sued Koylas Chunder to establish his right to build a wall across a drain, and, the latter having set up his prescriptive right to use the drain, it was held that no such prescriptive right existed. One Kalishunker then sued Gopal Chunder claiming to use the same easement, and the latter pleaded that the previous judgment operated as res judicata and that Kalishunker was claiming under Koylas Chunder within the meaning of the explanation, and the lower Courts so held upon the ground that the right claimed by Koylas in the former suit was a private right which he claimed in common for himself and others. Garth, C.J., and Mitter, J., however, held that the claim of each owner was essentially a separate claim in respect of his own premises.

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[1] *Phillips* v. *Ward*, 2 H. & C., 717 [1863].

[2] *Kallishunker Doss* v. *Gopal Chunder Dutt* I. L. R., 6 Calc., 49 [1880], citing *Arlett* v. *Ellis*, 7 B. & C., [1827]; *Blewett* v. *Tregonning*, 3 A. & E., 554 [1835]. It is doubtful if the explanation applies to cases like *Archakam* v. *Udayagiry*, 4 Mad. H. C., 349 [1869] (right to receive honours as priest of a temple); *Krishnambhat* v. *Lakshumanbhat*, 1 Bom. H. C., 141 [1864] (right to fees for hereditary services). In *Kalikanta Sarma* v. *Gouri Prosad Burma*, I. L. R., 17 Calc., 906 [1890] (a suit to establish a right to the regular offerings made in a temple), it was held that all the parties interested should be before the Court.

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In *Hazir Gazi* v. *Sonamonee Dassee*,[1] it was said that the explanation would not have the effect of making a judgment, obtained against one co-sharer in certain property, conclusive against another co-sharer where the suit did not purport to have been litigated *bonâ fide* in respect of a right claimed in common by both. And in *Vasudeva* v. *Narayana*[2] the opinion was expressed that the explanation does not refer to the case of a defendant at all, but only to the case of a plaintiff.[3] But the explanation is framed in the widest possible terms. Scope and meaning of the explanation.

It seems also to have been assumed in some of the Madras cases that the explanation applies to suits for land.[4] In *Madhavan* v. *Keshavan*,[5] a decree, in a suit brought by one of five trustees of a certain *devasam* to recover trust property, was held to be a bar to a second suit brought for the same purpose by another trustee who was not a party to the first suit on the ground that he must be deemed to claim under the plaintiff in the first suit. It was, however, pointed out in *Varanakot Narayanan* v. *Varanakot Narayanan*,[6] that whereas section 30 of the Code may embrace claims of a public nature, Explanation 5 is confined to *private* rights, but in that case (a suit for land) it was held that the members of a Malabar tarwad claim under a karnavan, suing as such, within the meaning of the explanation.[7] Madras.

In *Ram Narain* v. *Bisheshur Prasad*,[8] a decree obtained against two members of a joint Hindu family for trespass to a wall, the plaintiff's right thereto being declared, was held not to bind a third member since the defendants did not claim any right in common for themselves and others, within the meaning of the explanation. "I think," said Edge, C.J., "that we should be careful in applying Allahabad.

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[1] I. L. R., 6 Calc., 31 [1880].

[2] I. L. R., 6 Mad., 121 (126) [1882].

[3] "Explanation 5 of section 13 of the Civil Proceedure Code has been sometimes regarded as authorising a departure from the usual procedure, and as making a decree binding on a person not a party, where the person who was actually the party defendant was jointly interested with him in the subject-matter of the suit and *defended* the suit *bonâ fide*; but *Hazir Gazee* v. *Sonamonee Dassee* is an authority the other way, and the explanation does not seem to me to refer to *bonâ fide* defences but *bonâ fide* claims," *per* Innes, J., at pp. 126, 127.

[4] See *Latchanna* v. *Saravayya*, I. L. R., 18 Mad., 164 [1894].

[5] I. L. R., 11 Mad., 191 [1887]; *Vasudeva* v. *Narayana*, I. L. R., 6 Mad., 121 [1882].

[6] I. L. R., 2 Mad., 328 [1880].

[7] It is now settled that every member of a tarwad is entitled to be made a party or to have notice in suits by or against the karnavan.—*Ittiachan* v. *Velappan*, I. L. R., 8 Mad., 484 [1885], see *supra*, p. 311.

[8] I. L. R., 10 All., 411 [1888].

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Explanation 5 of section 13 of the Code of Civil Procedure and that the explanation should not be applied to any case which does not come within the very wording of that explanation."

Is the explanation to be read with s. 30?

If the operation of the explanation be restricted to rights of fishery, pasturage and the like, as held in Calcutta, the rule that all persons materially interested in the subject-matter of the suit are to be made parties would seem to have been dispensed with,[1] and the explanation stands clear of the provision in section 30 of the Code which requires the permission of the Court to be obtained when one or more persons, out of a numerous class who are in the same interest, seek to sue or defend on behalf of all the persons interested. Upon this construction it is obvious that it would be impracticable or at least very inconvenient, to give notice to all the persons interested in such a private right.

In *Thanakoti* v. *Muniappa*[2] it is broadly stated that the explanation is to be read with the provisions of section 30, and the principles to be found in that section. Five raiyats sued to obtain a declaration that they were entitled to the exclusive use of the water in a certain channel by day. One of the plaintiffs, A, had unsuccessfully sued two of the defendants and others for damages for the loss of his crops consequent upon the diversion of the same channel, alleging that he and other raiyats of his village were entitled to the water in the day, the defendants being entitled to the user at night. The Court held that, if section 30 had been followed, the defence of res judicata might have succeeded against the plaintiffs as well as against A. There is, however, authority in Madras to the effect that explanation 5 is not limited to the case of a suit in which the provisions of section 30 were complied with.[3]

If the provisions of section 30 are to be read as incorporated with section 13, so as to make the leave of the Court necessary in the case now under consideration, it is difficult to see why the explanation should have been enacted.

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[1] See *Cockburn* v. *Thompson*, 16 Ves., 321 [1809].

[2] I. L. R., 8 Mad., 496 [1885]. See *Munmohun Singh* v. *Amritnath Chowdree*, W. R., 1864, 167; *Blakemore* v. *The Glamorganshire Canal Co.*, 2 Cr., M. & R., 133 [1835].

[3] See *Varanakot Narayanan* v. *Varanakot Narayanan*, I. L. R., 2 Mad., 328 [1880]; *Sri Devi* v. *Kelu Eradi*, I. L. R., 10 Mad. 79 (82) [1886].

CHAPTER IV.

Matters in Issue and Matters Incidental and Collateral.

Decree how to be construed—English authorities—Rule in India—The judgment and the record may be looked to, and in some cases the conduct of the parties after the decree—*Kali Krishna Tagore's case* [1888]—*The Secretary of State* v. *Durjibhoy Singh* [1882]—Definition of decree—Question whether the issue was substantially decided one of fact—Rule in *Duchess of Kingston's case* and in *Barrs* v. *Jackson*—The question must have been in substance part of the cause of action—Matters incidental—The matter must have been alleged and admitted or denied—A question may have been put in issue and decided in a cause relating to a different subject-matter—Issue as to adoption—Waste—Ejectment—Document—Question of title in Land Acquisition case—Malikana—Principal and agent—Mofussil suit, accounts—Interest—Satisfaction of bond—Issue as to area of land—Rent-suits—Set-off of previous claims—Status—Title, deshpande vatan—Mortgagor and mortgagee—Decree modified on appeal—Decision erroneous in law—Claim included in previous suit but not put in issue—Issue need not have been expressly raised if in substance the matter has been decided—Decision by necessary implication—Matters incidentally determined—Matters not entertained by Appellate Court—Matter advisedly left undetermined—Findings not embodied in decree but upon which the Court has expressed an opinion—*Niamat Khan* v. *Phadu Buldia* [1890] and subsequent cases.

Decree how to be construed.

Estoppel by Judgment results from a matter having been directly and substantially in issue in a former suit, and having been therein heard and finally decided.[1] The question has not always been free from doubt as to what may be looked to, in order to see what has been in issue in a previous suit, and what has been actually decided.

English authorities.

In *Hunter* v. *Stewart*[2] Lord Westbury, L. C., refers to the rule that one of the criteria of the indentity of two suits, in considering a plea of res judicata, is to enquire whether the same evidence would support them both, and appears to consider that the question, whether a former decree operates as res judicata in a subsequent suit, depends upon a comparison of the two records. In *Robinson* v. *Duleep Singh*,[3] the Court of Appeal held that Lord Justice Fry

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[1] *Kali Krishna Tagore* v. *Secretary of State for India*, I. L. R., 16 Calc., 173; L. R., 15 I. A., 186 [1888].

[2] 4 De G. F. and J. 169 [1861].

[3] L. R., 11 Ch. D., 788 [1878]. In *In re May.*, L. R., 25 Ch. D., 236, Pearson, J., referring to this case, said: "I find that that case simply decided, what really

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had construed the issues in a former suit too rigidly, and that the decree and the pleading must be taken into consideration. Lord Justice James observed: "The issues are only a proceeding in a cause for the purpose of ascertaining a fact for the guidance of the Court in dealing with the right; and what determines the right is the decree, and in order to determine what the decree really decides it is essential to see what were the rights which were in dispute between the parties and which were alleged between them. Because, if the Court had gone beyond the rights which were properly in issue between the parties, the decree of the Court would be absolutely null and void."[1] «And in *Houston* v. *Marquis of Sligo*[2] the pleadings and the judgment in the Irish action were looked to to ascertain whether the controversy was the same in both suits.

Rule in India. The judgment and the record may be looked to, and in some cases the conduct of the parties after the decree.

The rule in this country appears to be that, although the decree in a former suit operates as res judicata, the decree is to be construed with reference to the pleadings and the record in order to see what was in issue.[3] Even the acts of the parties immediately after the decree are very important to fix the meaning of indefinite terms in the decree.[4]

Privy Council decisions.

In *Kali Krishna Tagore* v. *Secretary of State for India*,[5] a suit to recover certain lands as being a re-formation on the original site of the plaintiff's zemindari, and to have it declared that certain revenue-proceedings by which the land had been settled with the defendant should be set aside, the Calcutta High Court held that

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needed no decision at all, that, if a decree of that Court is capable of more than one construction, you must, in order to ascertain what is the proper construction, look at the pleadings in the action to discover what was the issue which the Court intended to decide."

[1] L. R., 11 Ch. D. 813.

[2] L. R., 29 Ch. D., 448 (455) [1885], *per* Pearson, J. "It is clear, I apprehend," said Sir G. Mellish, L. J., in *In re Bank of Hindustan, China and Japan* [L. R., 9 Ch. Ap., p. 25 (1873)], "that the judgment of the Courts of Common Law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, *provided that from the judgment itself the actual grounds of the decision can be clearly discovered.*" And in *Edun* v. *Beckus* [8 W. R., 176] Phear, J., observed: "The matter conclusively adjudicated upon in a suit *inter partes* is generally to be sought only by a comparison of the plaint with the judgment."

[3] "The object of any system of pleading is that each side may be made fully aware of the questions that are about to be argued in order that he may bring forward evidence appropriate to the issues." *Sayad Muhammad* v. *Fatteh Muhammad*, I. L. R., 22 Calc., 324 [1894].

[4] See *Secretary of State for India in Council* v. *Durjibhoy Singh*, L. R., 19 I. A., 69 (74) [1892].

[5] I. L. R., 16 Calc., 173; L. R., 15 I. A., 186 [1888].

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a decree of the Subordinate Judge in a previous suit operated as an estoppel. But on referring to the judgment it appeared that the Subordinate Judge gave as his reason for dismissing that portion of the claim that, so long as a certain order of the Superintendent of Diara Surveys remained in force, the plaintiff's right to those excess lands must be considered as either extinguished or in abeyance, and he was not therefore *then* entitled to recover them. The High Court observed: "The decree as it stands constitutes the record of the rights of the parties, and it is the source that defines the limits of the estoppel arising from the proceedings. We cannot look to the judgment as we were asked to do in order to qualify the effect of the decree."

Kali Krishna Tagore's case [1888].

But the Judicial Committee said: "The High Court have given to the decree an effect directly opposed to what was intended by the Subordinate Judge, it being clear that he only intended to decide that the plaintiff was not then entitled to possession. The law as to estoppel by a judgment is stated in section 6 of Act XII of 1879, and section 13 of Act XIV of 1882. It is that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not shew on what ground, and does not afford any information as to the matters which were in issue or have been decided."[1]

The Secretary of State *v.* Durjibhoy Singh [1892].

In *Secretary of State for India in Council* v. *Durjibhoy Singh*[2] the Judicial Committee construed a decree by reference to the acts of the parties immediately after the decree. In that case the decree-holders in 1865 had obtained against the Government a decree for possession of the lands in suit, but neither in the plaint

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[1] I. L. R., 16 Calc., 192, 193. See *Jagatjit Singh* v. *Sarabjit Singh*, I. L. R., 19 Calc., 159 (172); L. R., 18 I. A., 165 (176) [1891]. "When a decree simply dismisses a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided." It has recently been held at Allahabad that if a decree is specific, and is at variance with the judgment, the statement in the decree is to prevail. *Indarjit Prasad* v. *Rickha Rai*, I. L. R., 15 All., 3 [1892].

[2] L. R., 19 I. A., 69 [1892].

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nor in the execution-proceedings were the lands in suit described with sufficient certainty, and the lands were therefore demarcated and possession taken in a manner subsequently approved by the revenue authorities. In 1883 the Government sued to eject the decree-holders, alleging that they had obtained possession improperly. The Judicial Committee were of opinion that the lands so demarcated must be accepted as covered by the decree, there being very strong reason to infer that possession was rightfully taken in execution of the decree, and that the matter was therefore *res judicata* between the parties.

Findings not embodied in decree.

The Privy Council appear to overrule as to this point certain decisions in this country in which it has been held that it is incumbent on the parties to see that all the material findings in each case are embodied in the decree so that the decree may be in conformity with the judgment; and if this is not done the decree will be taken as conclusive evidence of what is *res judicata*.[1] The subject is further considered at the close of the present chapter.

In *Lachman Singh* v. *Mohan*,[2] Stuart, C.J., appears to have enunciated the correct rule. "It appears to me . . that we may look not only into the judgment but into the pleadings to see what the decree really means. . . As to the decree itself I hold the opinion very strongly that, where it is ambiguous or imperfect as to any essential particular, it may be read with the judgment and the record. Nor is this view of the legal quality of a decree inconsistent with the definition of a decree given in section 2 of the Code, where it is defined to mean 'the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied.' This definition in no way prevents us from looking into the judgment and record, in order to a correct understanding of the true meaning and intended application of the decree as formally drawn up.[3]"

Definition of decree.

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[1] See *Niamut Khan* v. *Phadu Buldia*, I. L. R., 6 Calc., 319 [1880]; *Devarakonda Narasamma* v. *Devarakonda Kanaya*, I. L. R., 4 Mad., 134 [1881]; *Anusuyabai* v. *Sakharam Pandurang*, I. L. R., 7 Bom., 464 [1883]; *Avala* v. *Kuppu*, I. L. R., 8 Mad., 77 [1884]; *Jamaitunnissa* v. *Lutfunnissa*, I. L. R., 7 All., 606 [1885]. But *see* the recent case of *Indarjit Prasad* v. *Richha Rai*, I. L. R., 15 All., 3 [1892]. See pp. 342-345, *infra*.

[2] I. L. R., 2 All., 497 [1879].

[3] *Ib.*, 498, 9. See *contra* the distinction between 'judgment' and 'decree' drawn by Straight, J., at pp. 509, 510, adopted by the Full Bench in *Jamaitunnissa* v. *Lutfunnissa*, I. L. R., 7 All., 606.

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Question whether the issue was substantially decided is one of fact.

The question whether an issue has substantially been raised and decided appears to be a matter of fact to be determined upon the circumstances of each particular case.[1] It is apprehended that a finding which forms no part of the decision in a case, and upon which the decree is no way based, can never operate as *res judicata*.

Rule in Duchess of Kingston's case and in Barrs *v.* Jackson. The judgment must have been directly upon the point.

The rule as laid down in *The Duchess of Kingston's case*[2] and in *Barrs* v. *Jackson*[3] has been approved by Lord Selborne, L.C., in *The Queen* v. *Hutchings*,[4] and has been frequently affirmed by the Courts of this country in the terms of Sir William De Grey's judgment in *The Duchess of Kingston's case*,[5] and in those of the judgment of Knight Bruce, V. C., in *Barrs* v. *Jackson*.[6] The judgment to operate as an estoppel must have been directly upon the point, and no finding as to any matter incidentally cognisable, or to be inferred by argument from the judgment, can operate as such. Provided the immediate subject of the decision be not withdrawn from its operation so as to defeat the direct object of the decision, the parties may litigate matters incidentally or collaterally in issue between them for any other purpose as to which they may come in question.

In *Run Bahadur Singh* v. *Lucho Koer*[7] their Lordships of the Privy Council say: "Having regard, however, to the subject-matter of the suit, to the form of the issue, and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than *incidental and subsidiary to the main question*, viz., whether any and what rent was due from the tenant, and that on this ground also the judgment was not conclusive."[8]

So also where a judgment is ambiguous.[9] In the case now cited their Lordships of the Judicial Committee say: "The plaintiff is

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[1] See *Girdhar Manordas* v. *Dayabhai Kalabhai*, I. L. R., 8 Bom., 180, *per* West, J. [1882].

[2] 2 Sm. L. Cas., 9th ed., 812. See pp. 266—268, *supra*.

[3] 1 Y & C., 585. See pp. 270—272, *supra*.

[4] L. R., 6 Q. B. D., 300 (304) [1881].

[5] See *Mussamut Edun* v. *Mussamut Beehun*, 8 W. R.. 175 [1867]; *Kanhya Lall* v. *Radha Churn*, B. L. R., Sup. Vol., 662 [1867]; *Mahima Chandra Chuckerbutty* v. *Raj Kumar Chuckerbutty*, 1 B. L. R. (A. C.), 1 [1868].

[6] See *Ooma Churn Dutt* v. *Beckwith*, 5 W. R. (Act X Ru.), 3 [1866]; *Modhoo Ram Dey* v. *Boydonath Doss*, 9 W. R., 592 [1868]; *Gooroo Churn Sircar* v. *Brija Nath Dhur*, 24 W. R., 111 [1875].

[7] I. L. R., 11 Calc., 301; L. R., 12 I. A., 23 [1884].

[8] *Ib.*

[9] *Hera Lall* v. *Ganesh Pershad*, L. R., 9 I. A., 64 [1882].

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right in contending that this was a suit between the same parties in estate, relating in a great degree to the same subject-matter and in relying upon it as far as he can as an estoppel. It remains to ascertain what the real effect of the judgment in that suit was." And their Lordships held that the judgment in the former case was ambiguous as to the extent and duration of the liability assumed by the vendee, and did not decide that the contract of indemnity should run with the land."

Was the question in substance part of the cause of action.

It is conceived that the test to be applied is whether the question decided in the previous suit was in substance part of the cause of action, or whether it was only ancillary to the main cause, and the cases are to be considered from this point of view.

The cause of action cannot be said to have been heard and determined in a former judgment unless it was put in issue and directly determined. "It may be," observed Couch, C.J., in *Shib Nath Chatterjee* v. *Nubo Kishen Chatterjee*,[1] "that in that judgment there is a finding which may have some bearing upon that issue, or his judgment may contain observations applicable to such an issue; but he did not directly determine it. Any opinion which he may have incidentally expressed cannot be considered a finding upon the issue so as to make his judgment in the former suit a determination of the cause of action in the present suit."[2]

Matters incidental.

"Section 13 of the Code of Civil Procedure," said their Lordships of the Privy Council in *Jagatjit Singh* v. *Sarabjit Singh*,[3] "does not enact that no property comprised in a suit which is dismissed shall be the subject of further litigation between the parties. What it does enact is that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit, and has been heard and finally decided."

Explanation I. The matter must have been alleged and denied or admitted.

Having regard also to the terms of Explanation I to section 13, it is not sufficient that in order to constitute a bar of res judicata an issue should have been raised and incidentally decided, but it must appear that the matter referred to was alleged by one party and either denied or admitted expressly or impliedly by

[1] 21 W. R., 189 [1874].
[2] 21 W. R., 189.
[3] I. L. R., 19 Calc., 159 (172) [1891].

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the other.[1] And the issue must further have been a material one.[2]

Explanation I is well illustrated by the case of *Wilaiti Begum* v. *Nur Khan*,[3] where the defendant, in a suit for the value of bricks taken from a kiln, claimed a moiety of the kiln as belonging to him. It appeared that in a previous suit, in which the plaintiff claimed the moiety by right of inheritance, an issue was raised as to the ownership of that moiety, and was decided in the defendant's favour. The former decision was held to work an estoppel, the defendant's allegations having been expressly denied by the plaintiff in the former suit.

A question may have been decided in a cause relating to a different subject-matter.

Further, an estoppel may be binding upon the parties although the former decision related to a subject-matter different to that in suit. In *Rajah of Pittapur* v. *Sri Rajah Row Buchi Sittaya Garu*,[4] the plaintiff claimed as the reversionary heir of one Venkata Surya, the son of one Buchi Tamayya, who, as the plaintiff alleged, had been adopted by his father's father. The defendants relied upon a decision in which, as they contended, it had been conclusively determined, as between the plaintiff's father and Buchi Tamayya, that Buchi Tamayya had not been adopted. The former decision did not relate to the same property. Their Lordships of the Privy Council distinguished the cases of *Outram* v. *Morewood*[5] and *Barrs* v. *Jackson*,[6] and cited the observations of the Judicial Committee in *Krishna Behari Roy* v. *Brojeswari Chowdranee*[7] as to the construction of the expression "cause of action," holding that it had been determined in the previous suit that the plaintiff's father and Tamayya were not brothers because Tamayya had never been adopted. "In fact," said their Lordships, "the allegation of the plaintiff is substantially this: that Venkata Row (the plaintiff's father) had a right to say that Buchi Tamayya was not adopted when the establishment of his adoption would have given him a right to participate in the property of Niladri Row to which Venkata Row in the former suit claimed to be solely interested; but that the plaintiff, deriving title through

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[1] See *Shama Churn Chatterjee* v. *Prosunno Coomar Chatterjee Santikaree*, 5 C. L. R., 251 [1879].

[2] *Dahoo Munder* v. *Gopee Nund Jha*, 2 W. R., 79 [1865].

[3] I. L. R., 5 All., 514 [1883].

[4] L. R., 12 I. A., 16 [1884].

[5] 3 East., 346 [1803].

[6] 1 Y. & C., 585; 1 Ph., 582 [1842].

[7] L. R., 2 I. A., 283 [1875].

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his father Venkata Row, has a right to say that Buchi Tamayya was adopted when the fact of his adoption would entitle the plaintiff to inherit property as the reversionary heir of Tamayya's son. If ever there was a case in which the law of estoppel ought to apply, it appears to their Lordships that this is such a case."[1]

Issue as to adoption.

Where therefore an issue has been tried and determined as to the validity of an adoption, the same issue cannot be again raised between the parties in a subsequent liation. In *Krishna Behari Roy* v. *Brojeswari Chowdhranee*,[2] the plaintiff suing to set aside an adoption was held barred by the decision in a previous suit in which he had intervened as reversionary heir. This ruling was followed in *Arunachala* v. *Panchanadam*,[3] where the defendant had in a previous suit claimed to be the adopted son of one Muttu Pillai whose widow denied the adoption, and the suit was dismissed for default. Subsequently the widow recognised the defendant who entered into possession. In a suit by a reversioner to recover the estate of Muttu Pillai it was held that the question of the adoption was res judicata.

Waste.

Ejectment.

A suit substantially to restrain waste in respect of certain property rests upon a different cause of action to a suit for recovery of possession of the same property.[4] A suit for ejectment, which has been dismissed on the ground that the defendant has mortgaged the land for purposes of necessity, is no bar to a suit to redeem the mortgage.[5] But a decision as to the validity or otherwise of a document, where the question has been properly in issue and determined, is binding upon the parties or their representatives in subsequent litigation.[6]

Document, validity of.

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[1] L. R., 12 I. A., 20 [1884].

[2] L. R., 2 I. A., 283 ; I. L. R., 1 Calc., 144 [1875].

[3] I. L. R., 8 Mad., 348 [1885].

[4] *Zemindar of Pittapuram* v. *Proprietors of Kolanka*, I. L. R., 2 Mad., 23 ; L. R., 5 I. A., 200 ; 3 C. L. R., 265 [1878].

[5] *Vallabh Bhula* v. *Rama*, 9 Bom. H. C., 65 [1872].

[6] *Srimut Rajah Moottoo Vijaya* v. *Katama Nachiyar*, 11 M. I. A., 50 ; 10 W. R., (P. C.), 1 [1866] ; *Mulraj Lachmia* v. *Chalekany* 2 M. I. A., 54 [1838], as to a will ; *Dakhyani Debea*, v. *Dolegobind Chowdhry*, I. L. R., 21 Calc., 430 [1893] ; *Soorjomonee Dayee* v. *Suddanund Mohapatter*, 12 B. L. R., 304 ; 20 W. R., 377 ; L. R., I. A., Sup. Vol., 213 [1872] ; *Gour Ram Sadhookhan* v. *Punch Cowree*, 25 W. R., 366 [1876], as to a *Kobala* ; *Kally Persad Sein* v. *Mohesh Chunder*, 1 Hay, 430 [1862], as between co-defendants ; *Mir Furzund Ali* v. *Mussamut Jaffree*, 5 N. W., 118 [1873], as to a deed of gift ; *Dhundi* v. *Ram Lal*, 7 N. W., 149 [1875], as to a deed of sale.

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Question of title in Land Acquisition case.

In *Ram Chunder Singh* v. *Sadho Kumari*,[1] a decree awarding to one of the parties to a suit money deposited in a Treasury by a third party as the compensation for land taken by the latter for railway purposes, was based upon the right to the land, and the question of title was directly and substantially in issue in the suit. It was held that the contest of title was conclusive between them. In the case now cited, the tenure of a *ghatwal* had been held to be permanent in proceedings between the *ghatwal* and certain under-tenure-holders in which the right to receive the compensation money had been determined in favour of the *ghatwal* on the ground that the tenure-holders held upon sufferance. The decision was held binding in a suit by the *ghatwal* to resume an under-tenure as being determinable at will.

Malikana.

A suit for *malikana* was held to substantially raise between the parties the question of the proprietary right to the land in respect of which *malikana* was claimed.[2]

Matrimonial.

In a suit for dissoluution of marriage the fact of cruelty was held to be sufficiently established by the production of a previous decree for judicial separation on account of cruelty.[3]

Principal and agent.

Contract.

Where the plaintiff elected to sue the defendants as principals on a contract, the decision was held to bar another suit on the same contract in which the plaintiff sought to charge them as agents under a trade usage, since the essential facts would have to be established by the same evidence in both suits.[4]

Accounts, mofussil suit.

In *Gobind Mohun Chuckerbutty* v. *Sheriff*,[5] it was held that, in the Mofussil, a suit by a principal against his agent praying for an account, does not preclude the plaintiff from afterwards suing to recover the money so found due on the accounts being investigated. It is there pointed out that in practice two suits are generally allowed as there is no officer of the Court to whom the accounts are referred.

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[1] I. L. R., 12 Calc., 484 ; L. R., 12 I. A., 188 [1885].

[2] *Gopi Nath Chobey* v. *Bhugwat Pershad*, I. L. R., 10 Calc., 697 [1884].

[3] *Ledlie* v. *Ledlie*, I. L. R., 22 Calc., 544 [1895].

[4] *Devrav Krishna* v. *Halambhai*, I. L. R., 1 Bom., 87 [1876]. See the observations of West, J., in this case at p. 90.

[5] I. L. R., 7 Calc., 169 [1881]. See, however, *Degamber Mozumdar* v. *Kallynath Roy*, I. L. R., 7 Calc., 654 [1881] ; *Annoda Persad Roy* v. *Dwarkanath*, I. L. R., 6 Calc., 754 [1881] ; *Hurrinath Rai* v. *Krishna Kumar*, I. L. R., 14 Calc., 147 [1886].

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Interest.

In *Pahlwan Singh* v. *Risal Singh*,[1] a decision in a previous suit as to the date from which interest was payable in respect of a certain bond was held conclusive in a suit for subsequent instalments.

Satisfaction of bond.

In *Sheoraj Rai* v. *Kashi Nath*,[2] the plaintiff claimed to have four bonds cancelled on the ground that they were satisfied. In a previous suit upon two of these bonds the plaintiff, as defendant, had alleged that all the bonds had been satisfied, and an issue raised upon this point was decided against him. The Full Bench held that the previous decision was conclusive only as to the two bonds which were adjudicated upon in the first suit.

Issue as to area of land.

Where the plaintiff had sued the defendant to obtain a kabuliyat in respect of 8 bighas 17 cottahs of land, and it was determined that the defendant held 7 bighas only, the plaintiff was held to be precluded from afterwards suing to eject the defendant from the remaining 1 bigha 17 cottahs.[3] So where the defendant in a rent-suit admitted the sum claimed, but contended that he held a larger area of land than that specified in the plaint, an issue was raised on this point and decided against him. A suit brought by him to have it declared that the sum which he admitted comprised the rent for all the land held by him under the landlord was held to be barred.[4] But where the area of land though in issue between the parties has not been conclusively determined, the matter will not be res judicata. In *Roghoonath Mundul* v. *Juggut Bundhoo Bose*,[5] the Court held in a previous suit for rent that the raiyats were bound by a jamabandi signed by them, and did not decide whether the zemindar had overstated the area of the land. This decision was held to be no bar to a suit by the raiyats praying for measurement of the land.

The decision in a suit for rent, in which a measurement was made at the instance of the defendant with a view to ascertain whether the rent should not be reduced in accordance with the terms of the lease, was held not to bar the defendant in a subsequent suit for enhancement from questioning the measurement since the previous decision was only conclusive between the parties

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[1] I. L. R., 4 All., 55 [1881].
[2] I. L. R., 7 All., 247 [1884].
[3] *Gopal Chandra Roy* v. *Nabin Chandra Bhandari*, 3 B. L. R. (Ap.), 35 [1869].
[4] *Bussun Lal Shookul* v. *Chundee Dass*, I. L. R., 4 Calc., 686 [1879].
[5] I. L. R., 7 Calc., 214 [1881].

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upon the question whether the land demised was or was not less than, or equal to, the estimated quantity. Whether it was more than the estimated quantity was a question immaterial to the first suit.[1]

Rent-suits.

A decision in a suit for rent, in which the defendant's contention that he had held the land for more than twenty years at an uniform rent was supported by the Court, was held no bar to a suit for rent at an enhanced rate, since there was no decision as to whether the presumption to be drawn from such uniform payment had been rebutted by the plaintiff.[2] The cases as to *ex parte* decrees and decrees upon admissions in rent-suits are collected in a subsequent Chapter.[3]

Set-off of previous claim.

In *Amir Zama* v. *Nathu Mal*,[4] A sued B to recover his wages, and B claimed as a set-off a sum due for cloth which he alleged A had sold on his account on commission. In a previous suit B sued A to recover the price of cloth sold and delivered to A by him, and A pleaded that there had been no sale, but that he had received the cloth on commission sale. The latter question was not decided, and that suit had been dismissed on the ground that no sale by B to A had been proved. It was held that the claim for set-off was not barred by the previous decision.

It is obvious, however, that a defendant cannot be allowed to set-off any claim in respect of which a suit has been previously brought by him and dismissed upon a final adjudication.[5]

In *Luckhinarain Mitter* v. *Khettro Pal Singh Roy*,[6] a decision in a rent-suit, in which one K intervened claiming to set-off against the arrears of rent a sum deposited by him as assignee of a *durputni* taluk to protect his under-tenure from sale, was held by the Privy Council to be no bar to his recovering the amount of his deposit from the putnidars and his assignor.

Status.

In *Muthumadeva Naik* v. *Sevatta Muthumadeva Naik*,[7] the plaintiff sued to recover a zemindary upon the ground that he was the eldest son of his father. He had previously sued to obtain a declaration of his status as the son of his father's Pattaba Stri, or

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[1] *Ekram Mundul* v. *Holodhur Pal*, I. L. R., 3 Calc., 271 [1878].

[2] *Gopee Mohun Mozoomdar* v. *Hills*, I. L. R., 3 Calc., 789 [1878].

[3] Chapter VI, *infra*.

[4] I. L. R., 8 All., 396 [1886].

[5] *Abdoollah Khan* v. *Sreekunto Pershad*, 15 W. R., 252 [1871].

[6] 13 B. L. R., 146 [1873].

[7] 7 Mad. H. C., 160 [1872].

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royal wife, and it was held that he had failed to prove that he was the heir. The Court held that the matter was res judicata, no separate cause of action being alleged.

Title, deshpande vatan.

A decree declaratory of title obtained by a co-sharer in a *deshpande vatan* operates as res judicata in regard to his title, except so far as circumstances subsequent to the decree may affect it.[1]

Title, mortgagor and mortgagee. Rent-suit.

A, the purchaser of the right, title and interest of X, a mortgagor, sued the mortgagee B (who was also putnidar under X) for rent under the *putni* lease. The defendant had previously attached the mortgaged property under a decree obtained by him upon his mortgage and purchased the zemindari interest of X subject to the mortgage. It was held that the relation of zemindar to putnidar ceased upon the purchase by B, and this decision was held to bar a suit by A claiming to redeem the mortgage, as the rent-suit had involved the question of title.[2]

In *Ishri Dat* v. *Har Narain Lal*,[3] the plaintiff sued upon a mortgage alleging that the rights of the mortgagee had been conveyed to him by a deed of sale, but that document being unregistered and inadmissible in evidence the suit was dismissed. A fresh deed of sale having been executed by the vendor, the plaintiff again sued on the mortgage-bond. It was held that the previous decision was not res judicata, the two suits being brought upon different titles.

In *Ratan Rai* v. *Hanuman Das*,[4] a mortgagee sued his mortgagors to recover the principal and interest due upon the mortgage. It appeared that in two previous suits the person who had purchased the mortgaged property subsequent to the mortgage had been held primarily liable on the ground that he had received the balance of the sale-proceeds of the property which had been sold in execution of a decree against him. Previous to the present suit, however, he paid the sale-proceeds into Court, and the plaintiff drew out the money in part satisfaction of the principal and interest due to him. It was held that the *ratio decidendi* of the

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[1] *Dulabh Vakuji* v. *Bansidhar Rai*, I. L. R., 9 Bom., 111 [1884].

[2] *Radhamadhub Holdar* v. *Monohur Mukerji*, I. L. R., 15 Calc., 757; L. R., 15 I. A., 97 [1888].

[3] I. L. R., 3 All., 334 [1880].

[4] I. L. R., 5 All., 118 [1882].

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two previous suits no longer existed, and that these decisions were no bar to the plaintiff recovering.

Lien.

In *Umrao Lal* v. *Behari Singh*,[1] the *property* hypothecated in an instalment-bond was made a *defendant* together with the obligors, and the plaintiff obtained a decree, which was in execution held not to cover instalments falling due after the decree. The plaintiff then sued to recover such instalments by enforcement of his lien upon the property. It was held that the cause of action in the previous suit was not the same, as the plaintiff had not in that suit asked for a declaratory decree for instalments not then due, and it was doubtful whether the first Court could have granted such relief.

Decree modified on appeal.

Where a decree, so far as it declared the value of certain moveable property, was modified on appeal, there being no evidence as to the value, and a declaratory decree was made affirming the plaintiff's right to a 6-anna share, the plaintiff was held not to be debarred from bringing a second suit for the value of the moveable property.[2]

Decision erroneous in law.

It would seem that a decision upon a point at issue is no less a res judicata as between the parties, although the Court may have been mistaken as to the law, or although the judgment may be founded upon an erroneous view of the law which a Full Bench has subsequently disapproved.—*Gowri Koer* v. *Audh Koer*.[3]

In connection with this subject may be mentioned a decision of the Madras Court as to the effect of an erroneous judgment upon a point of law. It was held, in *Parthasaradi* v. *Chinna Krishna*,[4] that such a decision does not prevent a Court from deciding the same question between the same parties in a subsequent suit according to law. The circumstances of the case were, however, of a special nature.

Claim not put in issue although included in previous suit.

The mere fact that a claim has been included in a previous suit without its having been directly and substantially put in issue and decided, does not upon the dismissal of that suit preclude a subsequent suit upon it. In *Jagatjit Sing* v. *Sarabjit Singh*,[5] the

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[1] I. L. R., 3 All., 297 [1880].

[2] *Sheoraj Nundun Singh* v. *Raj Coomar*, 24 W. R., 23 [1875].

[3] I. L. R., 10 Calc., 1087 [1884].

[4] I. L. R., 5 Mad., 304 [1882].

[5] I. L. R., 19 Calc., 159 ; L. R., 18 I. A., 165 [1891].

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plaintiff, having in 1873 obtained a decree for possession of certain lands as belonging to village A, the lands being judicially ascertained but not demarcated, brought a further suit in 1877 to recover alluvial lands as belonging to village B, and included therein some of the lands decreed in the previous suit. The suit of 1877 being dismissed, he then sued in the Revenue Courts, and the lands last mentioned were demarcated and adjudged to belong to him, but the defendant denied the jurisdiction of the Courts. In 1886 the plaintiff sued to recover possession of the aforesaid lands, and the decision in the suit of 1877 was pleaded in bar. The Judicial Committee held that the dismissal of that suit did not bar the recovery of the land in question, no issue relating to it having been heard and finally decided in that suit. Their Lordships said: "Was then the title to the *Tappa Sipah* lands put in issue by the suit of 1877, and was it heard and finally decided against Kapurthala? . . . But it is clear that the moment land was shewn to belong to *Tappa Sipah*, it was considered as out of the suit. Both Courts treat it so, and both Courts direct Kapurthala to get the *Tappa Sipah* land ascertained . . . It seems to have been the express intention of both Courts to decide nothing about *Tappa Sipah*."

In *Ram Charan Buhardar* v. *Reazuddin*,[1] A sued as auction-purchaser to recover part of a taluk, and it was held that he had purchased not the tenure itself but the right, title, and interest of his judgment-debtors, and as he had failed to prove the specific lands held by them, the suit was dismissed without prejudice to the plaintiff's right, to bring a fresh suit for possession of the lands of the taluk in suit distinctly ascertained. A then sued some of the defendants and other persons. It was held that the question whether he had purchased the whole or a portion of the taluk was res judicata, but that the question, as to what lands A was entitled to by virtue of his purchase, had been left undecided in the first suit, and A was, therefore, entitled to a decision on that point.

Issue need not have been expressly raised

But it is necessary to observe that the mere fact that an issue was not framed will not prevent the operation of the rule of res judicata, provided that in substance the matter has been heard and

[1] I. L. R., 10 Calc., 857 [1884].

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determined. In *Soorjemonee Dayee* v. *Suddanund Mohapatter*[1] their Lordships of the Privy Council say :—" If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*[2] . . . Their Lordships are of opinion that the term 'cause of action' (section 2, Act VIII of 1859) is to be construed with reference rather to the substance than to the form of action. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Civil Procedure would by no means prevent the operation of the general law relating to res judicata on the principle '*nemo debet bis vexari pro eâdem causâ*.' "

if in substance the matter has been decided.

In the case now cited one Chuckurdhur adopted the plaintiff Suddanund and afterwards adopted one Bonomalee. He subsequently made a will dividing his property between them, and providing for a forfeiture in case either son disputed the will, in which case the entire property was to go to the other son. Shortly afterwards Chuckurdhur disinherited the plaintiff, who thereupon brought a suit against Chuckurdhur, Bonomalee, and other persons claiming under deeds executed by Chuckurdhur, to have the deeds and the will set aside and to have the adoption of Bonomalee declared invalid, alleging that the property was ancestral. In that suit only one issue was raised as to whether the plaintiff had assented to the adoption. It was held that the will must be set aside so far as it affected the plaintiff's right in ancestral property, but that the ancestral property should be held to include property inherited by Chuckurdhur, and not property acquired by him out of income. Upon the death of Chuckurdhur and Bonomalee, the plaintiff sued Chuckurdhur's widow and the surviving parties to the former suit for possession of the estate, on the ground that the inherited and acquired property were both ancestral. The defendants contended that such property as had been purchased by Chuckurdhur was self-acquired and could be disposed of by will, and that the question was res judicata. The plaintiff replied that

Soorjemonee Dayee *v.* Suddanund Mohapatter [1873].

Issue as to self-acquired property.

[1] 12 B. L. R., 304 [1873].

[2] See *Mussamut Mitna* v. *Syud Fuzl Rub*, 13 M. I. A., 573 [1870].

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the question was not so raised in the former suit as to give the Court jurisdiction to try it, and that the judgment upon this point was *ultra vires*. The Judicial Committee held that this question had been raised by the pleadings and treated by all the parties as being before the Court, and had been in effect decided in the previous suit, and could not be again raised between the parties in any other form.[1]

Status.

The above ruling was cited by the Judicial Committee in *Krishna Behari Roy* v. *Brojeswari Chowdhranee*,[2] a suit to set aside an adoption, in which it was held that the validity of the adoption had been affirmed in a previous suit in which the plaintiff had intervened as reversionary heir. Their Lordships observed that they were of opinion that the expression "cause of action" could not be taken in its literal and most restricted sense: "But, however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them." In that case, however, an issue was expressly raised.

Decision by necessary implication.

Jurisdiction.

A decision may be by implication. Thus in *Pahalwan Singh* v. *Maharajah Maheshur Buksh Singh*,[3] a suit was brought in the Shahabad Court claiming land coloured yellow in a plan as an accretion to land coloured green, as being part of the plaintiff's settled estate lying within the jurisdiction of the Court. The defence was that the land claimed belonged to the defendant's estate in the Ghazipur District, and the jurisdiction of the Court was objected to. The suit was decreed, and the defendants then sued in the Ghazipur Court to establish their title to the land coloured green. The Judicial Committee held that the Shahabad Court had jurisdiction to try the former suit, the decision in which by implication extended to the land coloured green which was found to be within the settled estate of the plaintiff in that suit, inasmuch as the land coloured yellow was found to be an accretion to it. The Ghazipur Court had, therefore, under section 14 of Act VIII

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[1] See *Gregory* v. *Molesworth*, 3 Atk., 626 [1747] *supra*, p. 310.

[2] L. R., 2 I. A., 283; I. L. R., 1 Calc., 144 [1875]: see *Arunachla* v. *Panchanadan*, I. L. R., 8 Mad., 348 [1885].

[3] 12 B. L. R., 391 [1872.]

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of 1859, no jurisdiction, the matter being res judicata, having been decided by a "competent authority" within the latter part of that section.

A decree made without jurisdiction cannot work on estoppel by res judicata.[1]

Matters incidentally determined.

In *Moni Roy* v. *Mussamut Rajbunsee Koer*,[2] a decision in a previous suit incidentally determining the boundary line between two villages was held not to be conclusive as to the ownership of land other than the land previously in suit.

In *Doorga Ram Paul* v. *Kally Kristo Paul*,[3] the previous suit was for damages in respect of fruit alleged to have been taken away from a garden, and for the purposes of ascertaining whether the plaintiffs were entitled to damages, the question of the ownership of the garden was incidentally raised and determined. A subsequent suit in which the plaintiffs claimed an undivided share in the garden was held not to be barred.

In *Jardine, Skinner & Co.* v. *Dwarka Nath Chuckerbutty*,[4] the validity of a pottah was observed upon in a previous suit which had been dismissed upon a preliminary point. The decision was held to be no bar to a subsequent suit based upon a separate cause of action.

Matters not entertained by an Appellate Court.

In *Mussamut Imaman* v. *Fazul Karim*,[5] the plaintiff sued to recover property, sold to him by the defendant in a former suit, and to have a certain parol gift declared invalid. In the previous suit the question of the validity of the gift had been raised in special appeal, but was not entertained. The Court held there was no res judicata, the causes of action being different. But the rule here rests upon the principle elsewhere fully examined[6] that a matter upon appeal ceases to be res judicata.

Where, therefore, an Appellate Court has advisedly confined its decision to one of two points decided by the lower Court, the other question is still open to the parties. In *Gungabishen Bhugut* v. *Roghoonath Ojha*,[7] the High Court in appeal in a previous case dealt only with the question of possession and did not determine

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[1] *Kalka Pershad* v. *Kanhaya Singh*, 7 N. W., 99 [1875].

[2] 25 W. R., 393 [1876].

[3] 3 C. L. R., 549 [1878].

[4] 14 W. R., 412 [1871].

[5] 7 N. W., 251 [1875].

[6] See pp. 295—297. *supra*.

[7] I. L. R., 7 Calc., 381 [1881]. See *Chunder Coomar Mitter* v. *Sib Sundari Dassee*, I. L. R., 8 Calc., 631 [1882].

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the question of title, which was accordingly held to be open for subsequent litigation.

Matters advisedly left undetermined.

In *Chinniya Mudali* v. *Venkatachella Pillai*,[1] the plaintiff, in 1866 sued to recover half of a village sold by his grandfather, on the ground that the village had been family property, and was sold without the consent of the plaintiff's father, and not for any family purposes. The defendant pleaded res judicata. It appeared that, in 1855, the plaintiff's father had sued the defendant's father upon the same deed to set aside the sale on the ground that the grandfather was, at the time of the sale, imbecile, and that the sale was invalid as having been made without the consent of the then plaintiff. The Court on that occasion decided in the then defendant's favour on the first ground, and distinctly refused to decide the case upon any other ground. Again, in 1862, the plaintiff sued the present defendant upon the same grounds as those taken by his father in the suit of 1855, and the suit was dismissed on the ground of res judicata. In the suit of 1866, Scotland, C. J., and Holloway, J., held that, although the Court, in the suit of 1855, might have adjudicated upon the question whether the sale had been made for family purposes and with the consent of the plaintiff's father, the Judge advisedly and distinctly refused to do so, and that consequently there was no res judicata as to this point.[2]

Findings not embodied in decree but upon which the Court has expressed an opinion.

At one time the test applied to discover whether a finding was incidental or not was the fact of its being embodied in, or excluded from, the decree, and many cases appear to have been expressly decided upon this ground. It will be convenient to consider these separately.

Two propositions appear to be well settled: (*a*) That the decree itself is not the test of what is or is not res judicata, but that the question in each case is what did the Court really decide? Res judicata in other words is matter of substance; (*b*) That where the decree of a Court is not based upon a finding but is in spite of it, such a finding cannot work an estoppel.[3]

Niamut Khan v. Phadu Bul-

In *Niamut Khan* v. *Phadu Buldia*,[4] the plaintiffs sued for enhancement of rent of a certain tenure. In a previous suit for

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[1] 3 Mad. H. C., 320 [1867].

[2] See tne observations upon this case in *Doorga Persad Singh* v. *Doorga Konwari*, I. L. R., 4 Calc. at p. 197 [1878].

[3] *Run Bahadur's case*, I. L. R., 11 Calc., 301; L. R., 12 I. A., 23 [1884].

[4] I. L. R., 6 Calc., 319 [1880].

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enhancement the defendant pleaded that no notice of enhancement had been received, and that the rent was not enhanceable, he and his predecessors in title having held it at a fixed rent from the Permanent Settlement. The Court dismissed that suit upon the ground that no notice had been given, but the Munsif stated in his judgment that he considered the rent enhanceable because he did not believe the pottah and *dakhilas* produced by the defendant. The latter finding was not embodied in the decree, but the Full Bench held that the matter had been substantially tried and decided within the meaning of the rule laid down by the Privy Council. This case appears to be overruled by *Kali Krishna Tagore* v. *Secretary of State*,[1] and *Ram Bahadur Singh* v. *Lucho Koer*.[2] Its effect has been further doubted in *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee*,[3] and *Thakur Magundeo* v. *Thakur Mahadev Singh*.[4] Bombay and subsequent cases.

In the last case the landlord sued to eject his tenant, who defended upon the ground that the tenure was permanent, and that the plaintiff was estopped by the conduct of his predecessor in title. A previous suit by the plaintiff had been dismissed on the ground that no notice to quit had been served, but the Court held at the same time that the tenure was not permanent. The Court held that the previous decision was not res judicata, "the decree dismissing the suit being based, not upon the finding adverse to the defendant in that case, but in spite of it." It was doubted whether *Niamut Khan's case*[5] was not overruled by *Run Bahadur Singh* v. *Lucho Koer*.[6]

In *Devarakonda Narasamma* v. *Devarakonda Kanaya*[7] the Court observed: "Certain recent decisions[8] appear to have held that the first clause of section 13, Civil Procedure Code, precludes a second trial between the same parties of matters which have been in issue and upon which the Judge has expressed his opinion in a former suit. We do not agree with this view. The words 'has been Madras.

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[1] L. R., 15 I. A., 186 [1888].

[2] I. L. R., 11 Calc., 301; L. R., 12 I. A., 23 [1884].

[3] I. L. R., 13 Calc., 17 [1886].

[4] I. L. R., 18 Calc., 651.

[5] I. L. R., 6 Calc., 319 [1880].

[6] I. L. R., 11 Calc., 301; L. R., 12 I. A. 23 [1884].

[7] I. L. R., 4 Mad., 134 [1881]. See also *Muttukumarappa* v. *Arumuga*, I. L. R., 7 Mad., 145 [1883]; *Avala* v. *Kappa*, I. L. R., 8 Mad., 77 [1884].

[8] *Niamut Khan* v. *Phadu Buldia*, I. L. R., 6 Calc., 319; *Lachman Singh* v. *Mohan*, I. L. R., 2 All., 497 [1879].

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heard and finally decided by such Court' apply, not to the expression of opinion in the judgment, but to what has been decided *by the decree*." As to this last point, however, it is apprehended that the case is overruled.[1]

Bombay.

In *Anusuyabai* v. *Sakharam Pandurang*,[2] the plaintiff prayed for a declaration, as against one defendant who claimed to be owner of certain lands, and as against another defendant who claimed to be mortgagee in possession, alleging that the lands were his. The suit was dismissed, but the Court held incidentally that the plaintiff was not entitled to possession by reason of the mortgage, and as he had not asked for redemption the suit must be dismissed. The High Court held that no appeal on the part of the first defendant would lie, as there was nothing in the decree which the plaintiff could afterwards use in his favour as res judicata. The decision on the incidental question was therefore not final.

Allahabad.

In *Jamaitunnissa* v. *Lutfunnissa*,[3] the plaintiff sued to obtain possession by right of inheritance and to set aside a *wakfnama*, and the defence taken was that the possession of the defendant could not be disturbed so long as a certain dower debt remained unsatisfied, and further that the deed was valid. The first Court held the deed was invalid, but upheld the defendant's possession. By the decree the suit was dismissed, but no finding as to the deed was embodied in the decree. On appeal the finding as to dower was affirmed, but the Court refused to decide upon the validity of the deed as being unnecessary to the disposal of the claim. A majority of the Full Bench of the High Court observed: "We are clearly of opinion that the findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of as to the plaintiffs' right to any portion of the relief sought by him as declared by the decree, amount to no more than *obiter dicta*, and do not constitute a final decision of the kind contemplated by section 13 of the Code."[4] And the Court held that the question as to the validity or

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[1] *Kali Krishna Tagore* v. *Secretary of State*, L. R., 15 I. A., 186.

[2] I. L. R., 7 Bom., 464 [1883].

[3] I. L. R., 7 All., 606 [1885].

[4] *Ib.*, 611. See *Mohan Lal* v. *Ram Dial*, I. L. R., 2 All., 843 [1880], where certain observations of the Court in a former suit to the effect that an account between the parties was not finally settled were treated as *obiter dicta*. See also *Deokishen* v. *Bano*, I. L. R., 8 All., 172 [1886].

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otherwise of the *wakfnama* was immaterial to the decision of the case.

Niamut Khan v. *Phadu Buldia*[1] has again been doubted in the recent case of *Thakur Magundeo* v. *Thakur Mahadeo Singh*,[2] where the plaintiff, as ticcadar, sued to eject the defendant from certain lands claiming the land as *majhes* land or land cultivated by the landlord or the ticcadar. The defendant pleaded his right of occupancy. The Court found that the land was *majhes*, but dismissed the suit on the ground of failure to prove notice to quit. It was held that this decision did not preclude the defendant, in a subsequent suit for ejectment, from pleading occupancy rights, since the issue in the previous suit could not be said to have been finally decided against him, inasmuch as the decree was not based upon it, and there could be no appeal against it, because the decree was in favour of the party against whom the finding was recorded.

"The right conclusion," observed Sargent, C. J., in *Ghela Ichharam* v. *Sankalchand Jetha*,[3] "we think on the language of section 13 of the Civil Procedure Code and the authorities, is that where the issue is not necessary for the decision of the suit, the decree couched in general terms does not cover the finding on that issue — nor indeed can such a finding by being expressly inserted in the decree acquire the force of res judicata which was wanting to it as part of the judgment of the Court. There is no section in the Code which makes it the more necessary to appeal from it because it has been so inserted — indeed the Code does not contemplate findings or issues being inserted in it.[4]"

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[1] I. L. R., 6 Calc., 319 [1880].

[2] I. L. R., 18 Calc., 647 [1891].

[3] I. L. R., 18 Bom. at p. 602, where the decisions are collected and commented upon.

[4] See Act XIV of 1882, ss. 2, 6, and the forms of decrees in the fourth schedule.

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CHAPTER V.

MATTERS CONSTRUCTIVELY IN ISSUE.

Explanation II ; matters constructively in issue—Canon of interpretation—*Hunter* v. *Stewart* [1861]—*Henderson* v. *Henderson* [1843]—*Srimut Rajah Mootoo* v. *Katama Natchiar* [1866]—*Woomatara Debia Unnopoorna Dassee* [1872]—Rule acted on in India before the Code of 1877—Question of fact as to what is a different title—*Denobundhoo Chowdhry's case* [1876]—In suits to recover possession of property, plaintiff must assert all his titles—Statement by the Chief Justice of the rule of res judicata—Distinction suggested in suits for possession—Decisions since *Denobundhoo Chowdhry's case*—Applications of the rule—Calcutta, Madras and Bombay decisions—The matter is to be regarded as essentially different when it constitutes a wholly different right in the plaintiff giving rise to a different duty on the part of the defendant—Cases in which Explanation II was considered—*Ghurbhit Ahir* v. *Ramdut Singh* [1880]—*Sheo Ratan Singh* v. *Sheo Sahai Misr* [1884]—Matters constructively in issue—Matters incidental or immaterial—Madras and Bombay decisions—Recent rulings in the Privy Council—*Mahabir Pershad Singh* v. *Macnaghten* [1889]—*Kameswar Pershad* v. *Rajkumari Ratnun Koer* [1892]—The rule is not to be applied where the matters in issue in both suits are so dissimilar that their union might lead to confusion—Explanation III ; relief claimed and not expressly granted to be deemed refused—Mesne profits.

Explanation II ; matters constructively in issue.

EXPLANATION II to section 13 of the Code provides that any matter which might and ought to have been made ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit. "If," said Baron Martin in *Newington* v. *Levy*,[1] "the parties have had an opportunity of controverting it, that is the same thing as if the matter had been actually controverted and decided." But it must be shewn that the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second.[2]

Canon of interpretation.

Considerable difference of opinion has prevailed in India as to the application of the principle contained in this explanation which, no doubt, was enacted with the purpose of reconciling the apparently

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[1] L. R., 6 C. P., 180 (189) [1870] citing *Greathead* v. *Bromley*, 7 T. R., 456 [1798]; *Langmead* v. *Maple*, 18 C. B. (N. S.), 255 (270) [1865]. See also per Blackburn, J., L. R., 6 C. P. at p. 193; *Rakhal Doss Singh* v. *Heera Motee Dossee*, 22 W. R. 282 [1874].

[2] See *Nelson* v. *Couch*, 15 C. B. (N. S.) 99 [1863]; *Midland Ry. Co.* v. *Martin & Co.*, L. R., '93, 2 Q. B., 172.

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conflicting views expressed in *Hunter* v. *Stewart*[1] and *Henderson* v. *Henderson*,[2] both of which decisions were largely relied upon before the enactment of the Code of 1877. And even since the enactment of the explanation now to be considered the cases have been far from uniform. The cases will, therefore, be presented as far as possible in the order of their decision, but the only clear rule to be extracted from them as to the interpretation of the explanation is that laid down by the Judicial Committee in the recent case of *Kameswar Pershad* v. *Rajkumari Ruttun Koer*,[3] to this effect, that it must depend upon the particular facts of each case to say whether a matter ought to have been made ground for defence or attack in a former suit. The explanation seems to have been intended to meet the case of a point which properly belonged to the subject of litigation in a former suit, and which the parties, exercising reasonable diligence, might then have brought forward.[4]

In *Hunter* v. *Stewart*,[5] the plaintiff had filed a bill in the Supreme Court of Sydney claiming to be admitted as a shareholder in respect of certain shares in a Loan and Banking Company, and his suit was dismissed. He subsequently filed his bill in England to obtain similar relief, but upon different grounds and equities to those relied upon by him in the former suit, although he might, if he pleased, have relied upon them in that suit. Lord Westbury held that the decision at Sydney was not conclusive, observing :— "Admitting the identity of the two suits in other particulars, the question is, whether there was in the suit at Sydney, and in the suit before me, *eadem causa petendi* ; that is to say, the same ground of claim, or one and the same case for relief. . . . In equity the plaintiff must recover *secundum allegata et probata* ; but here the allegations and equity of the one bill are different from the allegations and equity of the other. . . . It is indeed true that the case made by the second bill must be taken to have been known to the plaintiff at the time of institution of the first, *and might then*

Westbury, L. C., in Hunter v. Stewart [1861].

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[1] 4 DeG., F. & J., 168 ; 31 L. J. (Ch.), 346 [1861].

[2] 3 Hare, 115 [1843].

[3] L. R., 19 I. A., 234 (238) ; I. L. R., 20 Calc., 79 [1892].

[4] *Henderson* v. *Henderson*, 3 Hare, 115 [1843].

[5] 4 DeG., F. & J., 168 ; 31 L. J. (Ch.), 346 [1861].

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have been brought forward, and it may be said, therefore, that it ought not now to be entertained; but I find no authority for this position in civil suits; and no case was cited at the bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit seeking the same relief but stating a different case, giving rise to a different equity."[1]

Henderson v. Henderson [1843].

The above remarks should be read with the observations of Wigram, V. C., in *Henderson* v. *Henderson*.[2] "The plea of res judicata applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to *every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time*." This sentence, as observed in a recent case,[3] must be read with reference to that which immediately precedes it, where the Vice-Chancellor states the rule of the Court to be that, "where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case."

It is obvious, however, that where separate rights have been infringed, separate actions may be maintained, since the infringement of separate rights gives rise to separate causes of action.[4]

Early decisions of the Privy Council.

The principle, embodied in the above explanation in 1877, had already been asserted by the Judicial Committee. In *Srimut*

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[1] 4 DeG., F. & J., 168; 31 L. J. (Ch.), 346 [1861]

[2] 3 Hare, 115 [1843]. See these cases observed upon in *Chinniya Mudali* v. *Venkatachella Pillai*, 3 Mad. H. C. R., 320 [1867], and in *Udaiya Tevar* v. *Katama Nachiyar*, 2 Mad. H. C. R., 131 [1864].

[3] *Worman* v. *Worman*, L. R., 42 Ch. D., 296 (307) [1889], referring to *Ashe* v. *Woodhead*, 21 W. R. (Eng.), 573 [1873]; *Serrao* v. *Noel*, L. R., 15 Q. B. D., 549 [1885].

[4] *Per* Brett, M. R., in *Serrao* v. *Noel*, L. R., 15 Q. B. D., 549 (558) [1885]. See *Brunsden* v. *Humphrey*, L. R., 14 Q. B. D., 141 [1884].

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Rajah Moottoo v. *Katama Natchiar*,[1] the appellant sued to establish a Will. In a previous suit he had elected to abandon any title under the Will, and had rested his case on the issue whether the estate was separate or undivided. Lord Westbury in delivering judgment observed: "In the first place it is clear upon the former record, that the appellant had then the power of relying upon that document as being a valid Will. He might first have insisted that it was an undivided property, and that therefore the plaintiff in those suits had no interest therein; and secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour. When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged will; but, instead of doing so when his suit came on to be heard and decided in the Court of final Appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary."[2] Their Lordships, accordingly, upon the ground that the same matter was in issue in the previous suit, and that what was in issue must be taken to have been already decided, and also upon the ground of estoppel by conduct, dismissed the plaintiff's suit.

Srimut Rajah Moottoo *v.* Katama Natchiar [1866].

Woomatara Debia *v.* Unnopoorna Dassee [1872].

The principle was acted upon by the Judicial Committee in another case under section 2 of Act VIII of 1859 where the appellant was the plaintiff in both suits, and as such had the means of shaping her course as she chose. In *Woomatara Debia* v. *Unnopoorna Dassee*,[3] the cause of action in both suits was the dispossession of the plaintiff, and the identity of the subject-matter in both suits was admitted. In the first suit the appellant claimed that by *taufir*, i.e., gradual encroachment, she had enlarged the boundaries of her talook and acquired a right to the

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[1] 11 M. I. A., 50 [1866]; 10 W. R. (P.C.), 1.

[2] 11 M. I. A., 73.

[3] 11 B. L. R., 158; 18 W. R., 163 [1872]. See *Woomatara Debia* v. *Unnopoorna Dassee*, 10 W. R., 426; *Shib Sunker Neogy* v. *Huro Soonduree Goopta*, 13 W. R., 209 [1870].

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settlement of the land. Being defeated in that contention she brought a second suit alleging that the lands were, according to the true boundary, included within the limits of her talook and therefore belonged to her as of right. Their Lordships observed, as in the case last cited, that the plaintiff might in the first suit have set up an *alternative* title, but she ought not afterwards to be allowed to fall back upon a title which she had, with a full knowledge of all the circumstances, elected to abandon. Further, it could not be shewn that new circumstances had arisen altering the nature and the character of the questions to be determined,[1] since the plaintiff's title to the land was capable of being conclusively determined in the earlier suit. Their Lordships were, therefore, of opinion that the case came within the principle and letter of the section, and in so holding expressed an opinion that the principle upon which the decision proceeded was almost identical with that laid down by Lord Westbury in *Kotama Natchiar's case*.[2]

Rule acted on in India before Act X of 1877.

The above rule was acted upon in this country in several cases before the Code of 1877. In *Mussamut Wafeah* v. *Mussamut Saheeba*,[3] a widow, who omitted to plead her lien for dower in a suit against her by her husband's heirs, was held estopped from afterwards making a substantive claim. In *Asgur Mahomed* v. *Nuzeema Bibee*,[4] a pre-emptor, failing to assert her rights in a suit by the purchaser, was held estopped from enforcing those rights by suit. In *Maktum* v. *Imam*,[5] the plaintiff sued to recover a moiety of Rs. 1,000 which the defendant, as plaintiff in a former suit, had admitted to be in his possession. West, J., cited *Newington* v. *Levy*[6] and observed: "This was a matter which existed, if at all, at the time when the former suit was brought. Maktum had an opportunity of bringing it before the Court, and having lost that opportunity, cannot now rest a new suit upon it."

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[1] See *per* Turner, L. J., in *Shama Purshad Roy Chowdery* v. *Huro Purshad Roy Chowdery*, 10 M. I. A., 203 (211) [1864], a case under Bengal Regulation III of 1793, s. 16; *Newington* v. *Levy*, L. R., 6 C. P., 180 [1870].

[2] 11 M. I. A., 72.

[3] 8 W. R., 307 [1867].

[4] 14 W. R., 272 [1870].

[5] 10 Bom. H. C., 293 [1873]. For other cases see *Brojo Lall Roy* v. *Khetter Nath Mitter*, 12 W. R., 55 [1869]; *Dudnur Bibee* v. *Shakir Burkundaz*, 15 W. R., 168 [1871]; *Premanund Gossamee* v. *Ram Chera Deb*, 20 W. R., 482 [1873]; *Sree Kristo Biswas* v. *Joy Kristo*, 24 W. R., 304 [1875] as to plaintiffs.

[6] L. R., 6 C. P., 193 [1870].

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Division Benches of the Allahabad Court in *Baldeo Sahai* v. *Bateshar Singh*[1] and *Jadu Lal* v. *Ram Gholam*[2] following the Privy Council rulings held that a defendant, resisting a suit on the ground that the sale under which the plaintiff claimed was fraudulent and without consideration, could not afterwards sue to establish a right of pre-emption. Similarly, in *Pigou* v. *Syed Mohamed Aboo Syed*,[3] where a suit to set aside an execution-sale on the ground of irregularity had been dismissed on the merits, the plaintiff was held estopped from suing for possession of the property on the ground that the sale was void *ab initio*. In another Calcutta case *Dinomoyi Dabia Chowdhrain* v. *Anungo Moyi*,[4] a suit for rent and ejectment, it appeared that the defendant in a previous case had pleaded that his tenure was *istimrari* and not liable to ejectment. He now pleaded that his tenure was both permanent and transferable, and that he was protected under the provisions of the rent law. The Court held that this defence should have been raised in the former suit.

The question what is a different title is one of great practical difficulty, and must be decided upon the circumstances of each case separately.[5]

Question of fact as to what is a different title.

In *Kashee Kishore Roy Chowdhry* v. *Kristo Chunder Sandyal Chowdhry*,[6] a suit for declaration of the plaintiff's right to a chur, which they alleged was an accretion to an estate of theirs called Lukhidia, was held barred by a decision in a previous case in which they claimed the same land as an accretion to Rughoorampore. Couch, C. J., considered the case of *Woomatara Debia* v. *Unnopoorna Dassee*[7] to be not distinguishable observing: "If the plaintiffs did set up a title by accretion to Lukhidia that has been decided against them. If they did not, they ought to have done it, and having omitted to do it, they cannot do it now." In *Denobundhoo Chowdhry's case*,[8] Garth, C. J., remarked upon this case as follows:—"The plaintiffs in that suit were not relying upon a different title from that which they set up in the former

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[1] I. L. R., 1 All., 75 [1876].
[2] I. L. R., 1 All., 316 [1876].
[3] 3 C. L. R., 253 [1878].
[4] 4 C. L. R., 599 [1879].
[5] See *Girdhar Manordas* v. *Dayabhai Kalabhai*, I. L. R., 8 Bom., 180, *per* West, J. [1882]; *Kameswar Pershad* v. *Rajkumari Ruttun Koer*, L. R., 19 I. A., 238 [1892].
[6] 22 W. R., 464 [1874].
[7] 11 B. L. R., 158 [1872].
[8] I. L. R., 2 Calc., 169 [1876].

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suit. In both suits they claimed the land in question as an accretion to other land which was their undisputed property, and whether they claimed it as an accretion to one estate or another . . . they were in each case claiming it as an accretion to land of which they were confessedly in possession. The difference between the two suits was merely matter of description not of title." And it is obvious that the same evidence would have served to establish the essential facts in both cases.

The question whether a party to a suit is bound to assert all his titles was fully discussed by a Full Bench of the Calcutta High Court in 1876, and was answered in the affirmative.

Denobundhoo Chowdhry's case [1876].

In *Denobundhoo Chowdhry* v. *Kristomonee Dossee*,[1] the plaintiff sued to establish her right as heiress of her daughter, the deceased wife of the defendant, in respect of property conveyed by the plaintiff's husband to the daughter as her stridhan. In a previous suit, which was unsuccessful, the plaintiff had attempted to establish the invalidity of the deed of gift by which the property had been conveyed by her husband. The defence raised the question of res judicata on the ground that, in the previous suit, the plaintiff had failed to recover the self-same property, relying upon a different right.

The case was decided by a Full Bench of the Calcutta High Court upon the construction of section 2 of the Code of 1859, which enacted that "the Civil Courts shall not take cognisance of any suit brought on a 'cause of action' which has been heard and determined by a Court of competent jurisdiction in a former suit between the same parties."

In suits to recover possession of property, plaintiff must assert all his titles.

The majority of the Court[2] held upon the authority of the Privy Council Rulings,[3] though not upon a precisely unanimous view of the cases, that the plaintiff was barred. The opinion of the Court appears to proceed upon the ground that in this country the title to property is tried by a suit brought to recover *possession* founded upon title; that it is for the plaintiff to make out such a title to

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[1] I. L. R., 2 Calc., 152 [1876].

[2] Kemp, Jackson, Macpherson, and Markby, JJ.

[3] *Woomatara Debia* v. *Unnopoorna Dassee*, 11 B. L. R., 158; 18 W. R., 163 [1872]; *Srimut Rajah Moottoo, &c.* v. *Katama Natchiar*, 11 M. I. A., 50 [1866]; *Hunter* v. *Stewart*, 31 L. J., Ch., 346 [1861]; and see *Chinniya Mudali* v. *Venkatachella Pillai*, 3 Mad. H. C., 320 [1867]; *Kashee Kishore Roy Chowdhry* v. *Kristo Chunder Sandyal Chowdhry*, 22 W. R., 464 [1874].

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possession as will prevail against the defendants; and, to use the words of Phear, J. (whose judgment was concurred in generally by the Judicial Committee) in *Woomatara Debia* v. *Unnopoorna Dassee*[1]: "The adjudication of the suit determines . . not only the matter of the particular title which she sets up, but *the actual right to possession at the date of the plaint by whatever title it might be capable of being then supported;*" and that the Judicial Committee had adopted the stricter of the two views expressed in the Indian Courts.

Statement of the rule of res judicata by the Chief Justice.

The opinion of Garth, C. J., was afterwards approved by the Madras Court[2] and requires to be examined. The learned Chief Justice observed as to the meaning of the expression "cause of action"—"The true meaning of that expression is not the claim itself, as for instance, the money, or goods, or land, which the plaintiff seeks to recover, but the *grounds* upon which the claim is founded,"[3] and proceeded to define or paraphrase the rule of res judicata as recognised in England, and by the Civil Law, as comprising four requisites or conditions:—1*st*, that the parties in both suits are the same; 2*nd*, that the thing sought to be recovered is the same; 3*rd*, that the grounds upon which the claim is founded are the same; and 4*th*, that the character in which the parties sue or are sued is the same. After stating the definition of *Vinnius* elsewhere quoted,[4] as the best exposition of the Civil Law, the Chief Justice remarked:—"It is not enough that the parties and the subject of the suit should be the same, but also that *the ground or right* upon which the plaintiff's claim is founded should also be *substantially* the same. By using the word 'substantially,' I desire to exclude the supposition that a plaintiff may evade the application of the rule merely by varying his form of pleading, or by describing the subject-matter of his suit, or expressing his rights in different language. If the self-same question of right or cause of action has been in substance heard and decided between the same parties, no matter what the former language of the pleadings may be, the decision is conclusive between them."[5]

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[1] 10 W. R., 426; 2 B. L. R. (A. C.) 102 [1868].

[2] *Thyila Kandi Ummatha* v. *Thyila Cheria Kunhamed*, I. L. R., 4 Mad., 308. See also in *Konnerrav* v. *Gurrav*, I. L. R., 5 Bom., 589 [1881]; *Babu Lal* v. *Ishri Prasad*, I. L. R., 2 All., 582 [1878].

[3] I. L. R., 2 Calc., 156 [1876].

[4] *Supra*, pp. 273, 274.

[5] I. L. R., 2 Calc., 158.

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Distinction suggested in suits for possession.

The learned Chief Justice then divided suits for the recovery of land as contemplated by the Code of 1859[1] into two classes—(1) those in which the plaintiff has once been in possession ; (2) those in which he has never been in possession. In the first case, an action of trespass would lie in England, and it would be unnecessary to allege specifically the state of the title. In the second case, the plaintiff must state the grounds or title upon which his claim is founded as by purchase, gift, or inheritance. In the case under consideration, the plaintiff claimed in the first suit as heir to her husband, in the second suit as heir to her daughter, and her second suit involved a doubtful question of Hindu law as to the succession to the daughter, which could not have been raised in the first suit.

The Chief Justice then observed, upon the Code of 1859, that there was no obligation upon a plaintiff to bring forward all the grounds or titles under which she could possibly claim, and distinguished the Privy Council cases, remarking in conclusion : "It must constantly happen that, until the differences between contending parties have been ventilated and discussed in a Court of law, the litigants themselves are entirely ignorant of what their legal rights and position may be."[2]

Decisions since Denobundhoo Chowdhry's case [1876].

As above stated the determination as to whether a matter might and ought to have been made ground of defence or attack in a former suit is one of practical difficulty. The decisions of the Indian Courts since the case of *Denobundhoo Chowdhry*,[3] and the observations of those Courts, and of the Privy Council, as to the scope and object of the explanation require to be examined.

Applications of the rule.

The decision of the Full Bench in *Denobundhoo Chowdhry's case* was followed in *Bheeka Lall* v. *Bhuggoo Lall*,[4] where the same principle was applied to suits to recover a specific sum of money. The plaintiff claimed a specific sum of money, being the moiety of a decree which he alleged belonged to himself and his former partner by virtue of a partition between them. The defendant replied that in a former suit the identical sum had been claimed. The plaintiff contended that the first suit was based upon a general right to account, and was dismissed upon the ground that by the partition the business was put an end to. The

Calcutta.

[1] Act VIII of 1859, s. 26.
[2] I. L. R., 2 Calc., 171.
[3] I. L. R., 2 Calc., 152.
[4] I. L. R., 3 Calc., 23 [1877].

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Court held that in suits for money, as well as land, a plaintiff is bound to put forward every right under which he claims, and that the claim should have been made in the previous suit in the alternative form. The Full Bench decision was distinguished in *Radhanath Kundu* v. *Land Mortgage Bank*,[1] on the ground that the two suits were not identical.

In *Thyila Kandi Ummatha* v. *Thyila Kandi Cheria Kunhamed*,[2] the Calcutta cases were dissented from, and the Court adopted the view taken by Garth, C. J., in *Denobundhoo Chowdhry's case*.[3] In the first suit the plaintiff sued upon the basis of an oral lease to recover land. Issues were framed as to the title and the letting, but were not decided, the oral agreement not being proved. The Court observed: "In the former suit the obligation to pay rent and the non-payment of the rent constituted the cause of action put forward; the title was an incidental question.[4] In the present suit, the title is the cause of action. Plaintiff, no doubt, in the former suit prayed for possession of the *paramba*, and that relief was refused, and it is argued that this brings the case within the terms of Explanation II of section 13, and that as that relief was not granted in the former suit, it must be regarded as having been refused. That explanation, however, must be read with the section and clearly applies to relief applied for which the Court is bound to grant with reference to the matters directly and substantially in issue. Now the *causa petendi* in the former suit was the existence of the relation of landlord and tenant, and the omission to pay rent which entitled the plaintiff to recover the property. The title, no doubt, was in issue, but not directly and substantially, only incidentally, and that relief is now prayed for on wholly different grounds." Madras.

In *Sadaya Pillai* v. *Chinni*,[5] the plaintiff sued on a title created by agreement. He had previously sued to recover the same property by right of inheritance: The Court observed with reference to Act VIII of 1859. "Nor is there anything in that Act which required a plaintiff at once to assert all his titles to

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[1] I. L. R., 6 Calc., 559 [1880].
[2] I. L. R., 4 Mad., 308 [1881].
[3] I. L. R., 2 Calc., 152 [1876].
[4] They referred to *DeSouza* v. *Coles*, 3 Mad. H. C., 384 [1868]; *Jackson* v. *Spittal*, 39 L. J. (N. S.), 321 [1870]; *Durham* v. *Spence*, 40 L. J. (N. S.), 3 [1871].
[5] I. L. R., 2 Mad., 352 [1879].

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property or to be thereafter estopped from advancing them;" and held that the right on which the suit was brought was not the same as that asserted in the former suit, referring to the observations of the Judicial Committee as to the meaning of the expression "cause of action" in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*,[1] and *Rao Kurun Singh* v. *Nawab Mahomed*.[2]

Bombay.

In *Bhisto Shankar Patil* v. *Ramchandrarav*,[3] the plaintiff had instituted a former suit to recover possession of the same land on the ground of forcible dispossession. The claim was rejected on failure of proof of dispossession, but the Court suggested that the plaintiff might recover by bringing a fresh suit treating the defendant as a trustee and offering to make certain payments.[4] No issue as to title was determined. It was held that a second suit based upon an alleged breach of trust was not barred, the Court relying upon the observations of Lord Westbury in *Hunter* v. *Stewart*.[5] In *Konnerrav* v. *Gurrav*,[6] a suit claiming partition generally was held not to be barred by the dismissal of a previous suit founded upon an alleged deed of partition on the ground that, though the plaintiff might have framed his suit in the alternative it could not be said that he ought to have done so. The Court virtually adopted the opinion of Garth, C. J., in *Denobundhoo Chowdhry's case*.[7]

The matter is to be regarded as essentially different when it constitutes a wholly different right in the plaintiff giving rise to a different duty on the part of the defendant.

The observations of West, J., in *Shridhar Vinayak* v. *Narayan Valad Babaji*[8] and *Haji Hasam Ibrahim* v. *Mancharam Kaliandas*,[9] appear to throw light upon this difficult question.

In the first of these cases, the purchaser at an execution-sale sued to eject a person claiming under a deed of mortgage and conditional sale. The suit ultimately failed on the ground that the defendant had been in possession for a sufficient period to raise the bar of limitation, but on the day when the Court of first instance delivered judgment, the defendant sought to strengthen his position by stamping and filing his mortgage-deed which had previously been inadmissible in evidence. The plaintiff having

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[1] 11 M. I. A., 551 (605) [1867].
[2] 14 M. I. A., 187 (197) [1871].
[3] 8 Bom. H. C. (A. C.), 89 [1871].
[4] See *Watson* v. *The Collector of Rajshahye*, 3 B. L. R. (P. C.), 48 [1869].
[5] 4 DeG. F. & J., 168; 31 L. J. (Ch.), 346 [1861].
[6] I. L. R., 5 Bom., 589 [1881].
[7] I. L. R., 2 Calc., 152 [1876].
[8] 11 Bom. H. C., 224 [1874].
[9] I. L. R., 3 Bom., 137 [1878].

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by this fact, acquired the position of the purchaser of the equity of redemption, filed a suit to redeem the mortgage. It was contended for the defence that the plaintiff was bound to bring forward in the previous suit every circumstance upon which he could rely and of which he was aware. It was held that the previous decision was no bar.

The Court observed[1]: "The principle of res judicata, simple enough in its statement, is one that seems to present considerable difficulty in its application. We have accordingly been referred to a great number of decisions of the High Courts, which it would be hard, perhaps impossible, to reconcile in all respects with each other. The principal variances have arisen from different views of what did or did not constitute for the purposes of a second suit a ground of right identical with the one relied on in a previous suit." The learned Judge then continued: "In the case of *Woomatara Debia* v. *Unnopoorna Dassee*,[2] the Privy Council may at first sight seem to have departed from the principle enunciated by Lord Westbury,[3] but there the whole cause of action was considered as having arisen out of the decision of the revenue authorities. The transaction between the parties had been such as for juridical purposes should properly be regarded as one, and on that one transaction several suits between the parties could not proceed . . . The matter must be regarded as essentially different when it did not originate in the same transaction, and when it constitutes a wholly different right in the plaintiff giving rise to a different duty on the part of the defendant."

In *Haji Hasam Ibrahim* v. *Mancharam Kaliandas*,[4] the plaintiff, alleging that some of his tenants had attorned to the defendant in 1868, sued to recover possession of their lands. It appeared that the parties had acquired title by purchase from different co-heirs, that the plaintiff in 1864 sued to have the sale to the defendant set aside, but his suit was dismissed on his admission that he was then in possession of all the lands he had purchased, and that in 1869 he had attempted unsuccessfully in the guise of a partition suit to eject the defendant. Upon appeal in that suit he raised

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[1] 11 Bom. H. C., 228, 229.
[2] 11 B. L. R., 158.
[3] *Hunter* v. *Stewart*, 4 DeG. F. & J., 168; 31 L. J. (Ch.), 346.
[4] I. L. R., 3 Bom., 137 [1878].

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the question of the attornment, but the point was disallowed as not having been taken in the plaint. The plaintiff now contended upon the authority of *Hunter* v. *Stewart*,[1] that his cause of action, though in existence in 1869, had never been adjudicated upon.

West, J., referred to *Kashee Kishore Roy Chowdhry* v. *Kristo Chunder Sandyal*[2] as an authority for the proposition that a plaintiff must, in suing, bring forward all his grounds of right to the relief he seeks, and observed that this principle was in apparent conflict with *Hunter* v. *Stewart*,[3] and perhaps also with *Bhisto Shankar Patil* v. *Ramchandrarav*[4] and *Sridhar Vinayak* v. *Narayan valad Babaji*.[5] This conflict the learned Judge sought to reconcile by reference to an unreported case in the Bombay Court, where it is laid down that "a cause of action is to be regarded as the same if it rests upon facts which are integrally connected with those upon which a right and an infringement of the right have already been once asserted as a ground for the Court's interference.[6]"

Rule suggested by West, J.

Adopting this principle as consistent with *Hunter* v. *Stewart*,[7] the learned Judge held that the cause of action was the same in the second and third suits, observing: "There is not an allegation of a wholly different right or of a wholly different group of facts infringing it in this suit from what there was in the former one. The facts are connected in an essential jural relation, so that, had the plaintiff's whole case been brought forward before, it would not have involved separate investigations. This being so, we think that the plaintiff cannot now sue on the ground merely subsidiary to his main ground on which he seeks to reopen the litigation. Having striven to establish his title to land by one means, and failed, he cannot now establish that title by other means which were equally at his command when the former suit was tried, and so connected with the grounds on which he in that

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[1] 4 DeG. F. & J., 168; 31 L. J. (Ch.), 346.

[2] 22 W. R., 464 [1874].

[3] 4 DeG. F. & J., 168; 31 L. J. (Ch.), 346.

[4] 8 Bom. H. C. (A. C.), 89.

[5] 11 Bom. H. C., 224.

[6] *Naro Hari* v. *Anpurnabai*, Reg. Ap., No. 55 of 1873. See Printed Judgments for 1874, p. 218. See also the observations of the same learned Judge in *Girdhar Mazordas* v. *Dayabhai Kalabhai*, I. L. R., 8 Bom., 175 (180, 181) [1882].

[7] 4 DeG. F. & J., 168; 31 L. J. (Ch.), 346.

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case relied that they ought to have been submitted for consideration together."[1]

The rule here indicated appears to be supported by the terms of the recent judgment of the Judicial Committee in *Kameswar Pershad* v. *Rajkumari Ruttun Koer*[2] noticed below. The cases in which Explanation II was considered and directly commented upon will now be presented in their order of decision.

Cases in which Explanation II was considered.

In *Muttu Chetti* v. *Muttan Chetty*[3] the defendants and two others had jointly executed a document promising to pay to the plaintiff a specific sum of money and a certain amount of grain. The plaintiff had previously brought a suit upon an alleged promise by the defendants, subsequent to the advance, to pay their proportion of the loan. The Full Bench held the matter was not res judicata or within the meaning of Explanation II, as it could not be said that the claim upon the original agreement ought to have been made ground of attack in the former suit which was based upon what was held to be a mere acknowledgment of antecedent liability. Kernan, J., however, considered the claim to be for the same matter supported or evidenced by a different means, within the authority of *Denobundhoo Chowdhry's case*.[4]

Ghursobhit Ahir *v.* Ramdut Singh [1880].

The effect of Explanation II was considered in *Ghursobhit Ahir* v. *Ramdut Singh*[5] a suit for ejectment brought upon notice to quit. The defendant relied upon an alleged right of occupancy, and pleaded that, in a former suit for rent due under an agreement which was dismissed upon failure to prove the agreement, his present defence was raised though not adjudicated upon, and, as he had succeeded in that suit, he was in the same position as if the point had been decided in his favour.

Garth, C. J., observed : " I certainly do not read Explanation II as meaning anything so unjust or unreasonable ... According to my view this explanation is meant to apply to a case of this kind; where the defendant has a defence which if he had so pleased, he might and ought to have brought forward, but as he did not bring it forward, the suit has been decreed against him. The explanation means to say that, under such circumstances, the defendant is as

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[1] I. L. R., 3 Bom., 140.

[2] L. R., 19 I. A., 238; I. L. R., 20 Calc., 79 [1892].

[3] I. L. R., 4 Mad., 296 [1879].

[4] I. L. R., 2 Calc., 152 [1876].

[5] I. L. R., 5 Calc., 923 [1880].

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much bound by the adverse decree as if he had set up the defence, and that he is equally estopped from setting up that defence in any future suit under similar circumstances ; that appears to me to be the sort of case which Explanation II is intended to meet ; it certainly was never intended to enable a party to treat a point as having been decided in his favour in a former suit which was in fact not so decided, and which it was not necessary for the purposes of the suit to decide at all." [1]

In *Narain Dutt* v. *Bhairo Bukhshpal*,[2] the facts were as follows: The owner of an eight annas share in a certain mouzah mortgaged his share to Narain Dutt, and the share was inherited on the owner's death by his son Pirbhu, who caused *dakhil kharij* to be effected in respect of four annas in favour of one Sital, and sold the remaining four annas to the defendants. They and Sital sued the plaintiff to redeem the mortgage and obtained a decree, no defence being made. The plaintiff then sued to establish his right of pre-emption in respect of the four annas sold by Pirbhu to the defendants. The Court held with some doubt that the plaintiff should have asserted his right in the previous suit.

In *Sultan Ahmad* v. *Maula Bakhsh*,[3] the plaintiffs sued to recover a share in certain property claiming under the will of their mother Mammo. In a previous suit brought by Mammo to establish her rights as against the defendants, the plaintiffs had, upon their mother's death, been placed upon the record, and it was held that their father was entitled to the property as heir to his wife, and that the share was liable to be sold in execution of a decree which the defendant held against him. The plaintiffs did not in that suit assert their rights under their mother's will. The Court held that the plaintiff's title under the will should have been made a ground of defence in the previous suit, and that the plea was therefore res judicata under Explanation II.

In *Nirman Singh* v. *Phulman Singh*,[4] the plaintiff had previously sued the defendant and another, his co-sharers, for possession of his share in the property, and it was held that they were in possession of the share as mortgagees from a person from whom the

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[1] I. L. R., 5 Calc., 923 (924, 5).
[2] I. L. R., 3 All., 189 [1880].
[3] I. L. R., 4 All., 21 [1881].
[4] I. L. R., 4 All., 65 [1881].

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plaintiff derived his title. The plaintiff afterwards sued the defendant for possession, alleging, that the mortgage was invalid. The Court held that the mortgage was matter in issue in the previous suit which matter was res judicata within section 13 of the Code and Explanations I and II.

Sheo Ratan Singh *v.* Sheo Sahai Misr [1884].

In *Sheo Ratan Singh* v. *Sheo Sahai Misr*, the Explanation was further considered. There one Rajkumari, the childless widow of one Lakshmi, and his nephew, Bhagwan, sold a portion of his property. The brothers of Bhagwan then brought a suit against the vendors and vendee to establish their right of pre-emption, asserting their right to immediate possession of the property on the ground that they, as well as Bhagwan, had entered into exclusive possession of the estate of Lakshmi as his heirs. It was held that Rajkumari had succeeded to, and was in possession of, the property as the separate estate of her husband, and no question as to the title of the plaintiffs as actual heirs of Lakshmi was finally decided. The plaintiffs again sued to have the sale-deed declared invalid on the ground that Rajkumari was incompetent to alienate the property and contended that they had equal rights with Bhagwan as the reversionary heirs of Lakshmi. The Court observed: "The matter now substantially in issue between the parties, *viz.*, the presumptive title of the plaintiffs to possession of the property, if they survive Rajkumari, was not heard and finally decided in the former suit. Nor was such *alleged and denied* . . . by the parties in that suit. What was then asserted by the plaintiffs was a right to immediate possession of a part of the property on the ground of actual possession of the rest.

"Nor was the plaintiff's presumptive title matter which *might and ought* . . . . to have been made the ground of attack in the former suit. The law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them. A plaintiff may, with the leave of the Court,[1] join separate causes of action; but he is nowhere compelled to do so."

In *Nathu valad Pandu* v. *Badhu valad Bhika*,[2] it was held that a suit to recover possession on the strength of a deed of sale was not barred by a previous suit for specific performance of a contract of sale and to compel the execution of a sale-deed, the causes of

[1] I. L. R., 6 All., 358 [1884].

[2] Act XIV of 1882, s. 44.

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action being different in each case, and the object of Explanation II being to compel the plaintiff to rely on all grounds which were open to him in support of the claim made by his plaint, which in the first suit was confined to obtaining a regular deed of sale.

Matters constructively in issue.

As observed in the case of *Hari Narayan Brahme* v. *Ganpatrav Daji*,[1] Explanations I and II deal with matters *constructively* in issue in a former suit. There the grandson of one of four brothers sued the other brothers for partition of the village of Saspade. In a previous suit for partition of ancestral property, the three brothers had claimed the village as their own property, and the other brother had made no claim to the village as subject to partition. It was held that the matter was res judicata by reason of the former suit, the plaintiff's ancestor having neglected to bring the property into hotchpot.

Matters incidental or immaterial.

But Explanation II has no application to a matter incidentally decided or the determination of which is immaterial in the first suit. In *Churn Manjee* v. *Ishan Chunder Dhur*,[2] the plaintiff sued to recover damages for the removal of crops on the ground that he had purchased the jote and the crops thereon. The defendant contended that the transfer of the jote was invalid. The plaintiff obtained a decree, and subsequently sued in ejectment. It was held that the question of the transferability of the jote was not res judicata, not having been material to the decision of the first suit.

Madras.

In *Allunni* v. *Kunjusha*[3] the plaintiff sued by virtue of his position as karnavan of a tarwad to recover possession of certain lands. A previous suit, in which he had attempted to eject the same defendants on the ground that they had forfeited their right to enjoy the lands by mortgaging some of them to the prejudice of the tarwad, had been dismissed.[4] The Court held that the previous decision was no bar, the cause of action being in their opinion different. To the same effect is the decision in *Kandunni* v. *Katiamma*,[5] where the plaintiff, having failed to recover certain land claiming under a

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[1] I. L. R., 18 Bom., 537 [1893].

[2] I. L. R., 7 Bom., 272 [1883].

[3] 9 C. L. R., 474 [1881].

[4] I. L. R., 7 Mad., 264 [1883]. Muttusami Ayyar, J., observed: "It appears to me that Explanation II . . must be taken to refer to the title litigated in the former suit as contradistinguished from the relief claimed, and that where several independent grounds of action are available a party is not bound to unite them all in one suit, though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action."

[5] I. L. R., 9 Mad., 251 [1885].

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demise of 1856, was held not to be precluded from suing on a demise of 1835, of which the subsequent demise was alleged to be a renewal. In *Thandavan* v. *Valliamma*,[1] the parties having executed an instrument disposing of the property of a deceased person, one of them set up a will, and in a suit for a declaration that the will was a forgery, it was held that it was genuine. The same plaintiff then sued to enforce the instrument, and it was held that the previous decree did not preclude him from relying on the instrument, and alleging that the will was invalid according to family custom.

Bombay.

It has been held in Bombay under this explanation that a mortgagee, neglecting to obtain a provision reserving his right of sale in a redemption-suit, is estopped from filing a suit to recover the mortgage money by sale of the mortgaged property. In *Moloji* v. *Sagaji*[2] the defendant had obtained in 1883 a decree for redemption which contained no provision as to foreclosure or as to the time within which payment was to be made. The plaintiff in 1884 sued to recover the amount of the mortgage-debt from the defendant, personally and by sale of the mortgaged property. The defendant paid the amount of the debt into Court, but the plaintiff insisted upon his right of sale. The Court held that the right of sale of the mortgagee must be deemed under Explanation II to have been a matter directly and substantially in issue in the former suit and to have been merged in the decree, the question having been decided in effect or impliedly, negativing the mortgagee's right. The defendant having redeemed within three years was entitled to keep the property, the decree for redemption not having passed by limitation into a foreclosure decree.[3]

Recent decisions of the Privy Council.

This explanation was applied by the Judicial Committee in two recent cases. In *Mahabir Pershad Singh* v. *Macnaghten*,[4] the previous suit was on a mortgage-bond, and in that suit the defendants set up that by a separate specific agreement they were entitled to set-off rents due by the plaintiffs as their tenants, but they failed to prove the agreement, and a decree was passed

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[1] I. L. R., 15 Mad., 336 [1892].

[2] I. L. R., 13 Bom., 567 [1888].

[3] See *Gan Savant Bal Savant* v. *Narayan Dhond Savant*, I. L. R., 7 Bom., 467 [1883], dissented from in *Karuthasami* v. *Jaganatha*, I. L. R., 8 Mad., 478 [1885].

[4] I. L. R., 16 Calc., 682; L. R., 16 I. A., 107 [1889].

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without any deduction being made for the rents. The defendants then obtained rent-decrees, and the plaintiffs purchased the mortgaged estate at the sales held in execution of those decrees. The defendants then sued to have the sales set aside, and to have the mortgage-debt extinguished by setting it off against the amount due to them for rents. The Judicial Committee held that the equity upon which the defendants relied should have been pleaded in defence to the former suit, observing: "Their Lordships entertain no doubt that the proper occasion for enforcing the equity now pleaded would have been in defence to the mortgage-suit of 1877. That was certainly the suit in which any account, to which the appellants were entitled as in a question with their mortgagees, ought to have been taken. But the appellants not only abstained from putting forward any claim to a general accounting; they declared in their pleadings their intention of bringing a separate action for recovery of the rents, a proceeding which would have been wholly unnecessary if the plea which they urge in this appeal had been put forward and given effect to. The plea is within the meaning of section 13 of the Civil Procedure Code of 1882, a matter which ought to have been made ground of defence in a former suit between the same parties, and the appellants are therefore barred from insisting on it, *exceptione rei judicatae*."[1]

[1889].

The rule not to be applied where the matters in issue in both suits are dissimilar [1892].

In *Kameswar Pershad* v. *Rajkumari Ruttun Koer*,[2] the Judicial Committee say that it depends upon the particular facts of each case to decide whether a matter 'ought' to have been made ground for defence or attack. In the case now cited, the personal liability of the defendant might and ought to have been claimed against him in a former suit brought upon the same bond to enforce a charge alleged to be created thereby upon the corpus of the estate. Their Lordships observed: "That it 'might' have been made a ground of attack is clear. *That it 'ought' to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important;* in this case the matters were the same. It was

[1] I. L. R., 16 Calc., 682; L. R., 16 I. A., 113, 114.

[2] L. R., 19 I. A., 234 (238); I. L. R., 20 Calc., 79 [1892].

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only an alternative way of seeking to impose liability upon Run Bahadoor, and it appears to their Lordships that the matter 'ought' to have been made a ground of attack in the former suit, and therefore that it should be 'deemed to have been a matter directly and substantially in issue' in the former suit, and is res judicata."

Explanation III

Explanation III contemplates a decree being passed which does not expressly grant a certain relief, and it lays down that such relief must in that case be deemed to have been refused. It has no application to a case where a suit was not heard and determined, but was allowed to be withdrawn without leave to bring a fresh suit.[1]

There is neither reason nor authority for the contention that Explanation III was meant only to bar so much of the claim as is expressly dealt with in the judgment, but is not referred to expressly in the decree.[2]

Any relief claimed and not expressly granted is to be deemed to have been refused.

The effect of Explanation III was considered in the recent case of *Ramabhadra* v. *Jagannatha*.[3] In a suit for partition, the plaintiffs had asked for ten years past profits and for subsequent profits, and an issue was recorded to that effect. The Court gave a decree for partition with three years' mesne profits prior to the suit, the judgment and decree being silent as to the subsequent profits as to which there was no appeal preferred. The plaintiffs now sued to recover mesne profits for five years *from the date of the previous suit*, and the defendant objected that the mesne profits must be taken to have been refused by the previous decree. The Court observed: "The legal effect of Explanation III is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal, and the claim thereto in a fresh suit as res judicata. The obvious intention is to prevent parties, who once submit their claim for subsequent profits to adjudication in a suit for possession of immoveable property based on title, from harassing their opponents with a second suit in

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[1] *Kamini Kant Roy* v. *Ram Nath Chuckerbutty*, I. L. R., 21 Calc., 265 [1893].

[2] *Jibun Das Oswal* v. *Durga Pershad Adhikari*, I. L. R., 21 Calc., 252 (255) [1893].

[3] I. L. R., 14 Mad., 328 [1890]. See *Mon Mohun Sircar* v. *The Secretary of State for India in Council*, I. L. R., 17 Calc., 968 [1890]. See *Jibun Das Oswal* v. *Durga Pershad Adhikari*, I. L. R., 21 Calc., 252 [1893].

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respect of the same claim. If the District Court failed to adjudicate upon it, the appellants' remedy lay in rectifying the error by appeal, but not in relying on it as the basis of a second suit." The Court, therefore, held that the mesne profits accruing up to the date of the partition decree must be taken to have been constructively disallowed, but that the plaintiffs' claim to mesne profits accruing *since the decree* was not res judicata.

Mesne profits.

In *Mon Mohun Sircar* v. *The Secretary of State for India in Council*,[1] it was held by a Division Bench in Calcutta that where a decree for possession is silent as regards mesne profits which have accrued between the date of the institution of the suit and delivery of possession, a separate suit will lie for such subsequent mesne profits, sections 13 and 244 of the Code being no bar to such suit. The Court has power to award mesne profits either up to the date of institution or to that of delivery of possession, and section 211 of the Code is not imperative but discretionary.

In *Jiban Das Oswal* v. *Durga Pershad Adhikari*,[2] the plaintiffs claimed mesne profits as well in respect of the period preceding the date of institution of the former suit as in respect of the period succeeding that date and extending up to the date of the recovery of possession. It was held, distinguishing the earlier case, that the claim for mesne profits prior to the institution of the first suit was barred.

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[1] I. L. R., 17 Calc., 968 [1890]. See *Sadasiva Pillai* v. *Ramalinga Pillai*, L. R., 2 I. A., 219 (228) [1875]; *Fakharuddin Mahomed Ahsan Chowdhry* v. *Official Trustee of Bengal*, L. R., 8 I. A., 197 (206) [1881]; *Pratap Chundra Barua* v. *Swarnamayi*, 4 B. L. R. (F. B.), 113 [1869].

[2] I. L. R., 21 Calc., 252 [1893].

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CHAPTER VI.

Final Decision.

The Court must exercise its judicial mind: *Jenkins* v. *Robertson* [1867]—There must be a fair trial of right—Findings which are inconclusive or based upon technical points do not work an estoppel—Judgments by default—Inconclusive adjudications—Judgments upon technical points—Failure to give security for costs—Suit dismissed for plaintiff's non-appearance—S. 103 bars fresh suit for the same object and upon the same cause of action—*Shankar Baksh* v. *Daya Shankar* [1887]—*Chand Kour* v. *Partab Singh* [1888]—Rule enunciated—Power to allow plaintiff to withdraw with liberty to bring fresh suit—Application of s. 373 read with *Watson* v. *Collector of Rajshahye* [1869], where there has been a hearing but no adjudication on the merits—Difference of opinion at Allahabad—Neglect to produce evidence—*Marriott* v. *Hampton* [1797]—Suit dismissed on the ground of limitation—Upon appeal the matter ceases to be res judicata—Ex parte decrees in rent-suits—Calcutta Full Bench decisions—Decree for rent passed upon defendant's admissions—No res judicata unless the Court has found what is the proper rate of rent—Conclusiveness of partition-proceedings—No res judicata unless issue raised and finally decided—Estoppel by conduct or by previous decision.

The Court must exercise its judicial mind. Jenkins v. Robertson [1867].

In order to set in motion the rule of res judicata it is not only necessary (except in the case of judgment by consent or default) that a Court of competent jurisdiction shall have adjudicated upon the question, but its decision must have been final and binding. "Res judicata," said Lord Romilly in *Jenkins* v. *Robertson*,[1] "by its very words, means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. In my opinion res judicata signifies that the Court has, after argument and consideration, come to a decision on a contested matter." The matter must have been heard and finally decided, and the decision must be such as the Court making it could not alter (except on review), or reconsider of its own motion. Such a decision may, however, be final before it is appealed from within the meaning of the rule of res judicata.[2]

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[1] L. R., 1 H. L. (Sc. Ap.), 117 [1867]. See this case explained in *In re South American and Mexican Co.*, L. R., '95, 1 Ch. 45, 46.

[2] Act XIV of 1882, s. 13, Expl. IV.

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There must be a fair trial of right.

"What we have to be satisfied of," said Scotland, C. J., in "*Udaiya Tevar* v. *Katama Nachiyar*,[1] is that the ground of legal right, upon which the plaintiff sues, was a point raised and opened for decision in the former suits, and that it was finally dealt with by the judgment and decree." In other words, the cause of action must be heard and determined.

Judgments by consent or default.

But a judgment by consent is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case, for "a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end.[2]"

Findings which are inconclusive or based upon technical points do not work an estoppel.

It seems however to be true, generally speaking, that no finding which is inconclusive or based upon technical points can operate as a bar.

In *Howlett* v. *Tarte*,[3] the defendant pleaded, in an action for rent upon a building agreement, that a tenancy from year to year had been substituted for the agreement, and that notice to quit had been given and accepted in Michaelmas 1858, after which date no rent was due to the plaintiff in respect of the premises. The plaintiff replied by way of estoppel that he had signed judgment against the defendant in respect of rent due after that date upon the defendant's *default* to plead. It was held that the defendant was not estopped by his omission to set up this defence in the former action, the Court holding that estoppels are not to be extended without authority.

In *Goucher* v. *Clayton*,[4] the licensees of a patent were held not to be estopped in a suit for infringement by reason of their having in a previous suit consented to judgment being given against them, and having taken out a license to use the invention. "There is no evidence," said Wood, V. C., "of any issue between the parties. The defendants are supposed to say, 'We thought it not worth our while to try the question, and we therefore did not raise the issue.'

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[1] 2 Mad. H. C. R., 131 (140) [1864]. See *Saikappa Chetti* v. *Rani Kulandapuri*, 3 Mad. H. C. R., 84 [1866]: "It is necessary also to show that there was a decision finally granting or withholding the relief sought. 'Res judicata dicitur quae *finem* controversiarum pronuntiatione judicis accepit, quod vel condemnatione vel absolutione contingit'" [Dig. XLII, Tit. 1, § 1].

[2] *In re South American Co. ex parte Bank of England*, L. R., '95, 1 Ch. 37, 50 [1894].

[3] 10 C. B. (N. S.), 813 [1861].

[4] 11 Jur. (N. S.), 107 [1865].

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They submitted and paid 40*s.* damages and costs, possibly because they might have been unwilling to give over working, or incur the expense of litigation. At any rate, there appear to have been no pleadings in the action."

Similarly, in the case of *Rughoonath Singh* v. *Ram Coomar Mundal*,[1] upon a remand neither party appeared and the suit was accordingly dismissed. The Court held that the plaintiff might bring a fresh suit, the matter not having been conclusively heard and determined.

In *Brammoye Dassee* v. *Kristo Mohun Mookerjee*,[2] the daughter of a Hindu widow sued on behalf of her two minor sons to recover their grandfather's share as reversioners. In a previous suit upon the same cause of action and against the same defendant, the Hindu widow cited the defendant as a witness, and on his failure to attend the suit was dismissed. The Court observed: "The rule that a decree against the widow binds the reversioner is subject to this qualification, that there has been a fair trial of right in the former suit. That has been laid down in what is commonly called the *Shivagunga case*,[3] and in the decision of this Court to the same effect, with which I entirely concur, in the case of *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry*.[4] It was there pointed out that the Privy Council in a more recent case[5] have said that, while they adhere to the rule that the widow represents the estate of the reversioner for some purposes, it is her duty not only to represent the estate but to protect it also."

The mortgagor of a certain share in joint property sued his coparceners for partition and possession, but when the suit came on for hearing allowed judgment to go against him by default. Subsequently the mortgagee, who had advanced the mortgage-money to enable the mortgagor to bring the previous suit, brought a suit against the mortgagor and his co-sharers to obtain possession of the share. The Court held that the previous suit was no bar, and that the circumstance that the mortgagor had permitted in that suit a decree to go against him by default, tended to show that he

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[1] 14 W. R., 81 [1870].

[2] I. L. R., 2 Cal., 222 [1876].

[3] *Katama Natchier* v. *Srimut Rajah Moottoo Vijaya*, 9 Moo. I. A., 539 [1863].

[4] 15 B. L. R., 142 (159) [1875].

[5] *Nugender Chunder Ghose* v. *Sreemutty Kaminee Dossee*, 11 Moo. I. A., 241 [1867].

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was not acting as the mortgagee's agent, and was very probably acting in collusion with his coparceners in abandoning the suit. The second suit was, however, on other grounds held to be wrongly framed.[1]

Inconclusive adjudications.

A recent case before the Privy Council affords an illustration of what does not amount to a final adjudication. In *Lakshman Dada Naik* v. *Ramchandra Dada Naik*,[2] the elder of two sons sued to obtain a declaration of his right to partition of the ancestral estate during his father's lifetime. The suit was dismissed, as to part of the property as premature, and as to another part because the property was beyond the jurisdiction of the Court. After his father's death, the plaintiff sued his brother, who claimed the property under a will. The Judicial Committee were of opinion that there was nothing in the former suit which amounted to an adjudication between the brothers as to their rights in the joint ancestral estate on their father's death.

In *Kanai Lall Khan* v. *Sashi Bhuson Biswas*,[3] a suit by the mortgagee against the mortgagor, the defendant died pending suit, and certain persons were made parties as the representatives of the mortgagor. They denied that they were the representatives, but no issue was raised or decided on this point, and a decree was made for the sale of the property. In a suit by them to have it declared that the mortgage and decree only affected the widow's life-interest, it was held that the decision in the previous suit was no bar.

Where a party agreed to be bound by the oath of certain persons taken in a certain temple as to questions of fact put in issue in the suit, the Madras Court held, upon the construction of sections 9 and 11 of the Indian Oath's Act,[4] that the decision of a question of title so arrived at could not be regarded as an adjudication operating as an estoppel in any future proceedings, and observed: "The terms of the Act indicate that the party consents to be bound only in respect of the subject-matter of the pending proceedings," and

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[1] *Krishnaji Lakshman* v. *Sittaram Murarrar*, I. L. R., 5 Bom., 496 [1880].

[2] I. L. R., 5 Bom., 48 [1880].

[3] I. L. R., 6 Calc., 777 [1881], followed in *Gourmoni Dabee* v. *Jugut Chandra Audhikari*, I. L. R., 17 Calc., 57 [1889]. See *Bepin Behari Bundopadhya* v. *Brojonath Mookhopadhya*, I. L. R., 8 Calc., 357 [1882]; *Delhi and London Bank* v. *Orchard*, I. L. R., 3 Calc., 47; L. R., 4 I. A., 127 [1877].

[4] Act X of 1873.

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referred to *Jenkins* v. *Robertson*[1] as an authority that a determination of matters in issue, otherwise than by the Court, is not a *judicium*."[2]

It is of course clear that no finding upon a question not directly put in issue and no opinion incidentally expressed can be regarded as a final judgment.[3]

Judgments upon technica points.

The rule of res judicata does not apply where a suit has been dismissed for misjoinder or undervaluation. In *Muhammad Salim* v. *Nabian Bibi*,[4] a suit to establish the purchase of certain property in execution of a decree was dismissed "in its present form" on the ground of misjoinder, and because the plaintiff failed to pay within the time limited certain additional Court-fees. In a subsequent suit upon the same cause of action against the same parties, the Court held that the former suit was no bar, there having been no adjudication upon the merits. In *Dullabh Jogi* v. *Narayan Lakhu*,[5] a suit to establish the right to use certain cooking utensils was dismissed upon appeal on the ground that it was improperly valued. In a subsequent suit the Court held that the plaintiffs were not precluded from presenting a fresh plaint in respect of the same cause of action, the former suit having only failed by reason of an informality.

Court-fees.

Parties.

Similarly, where a suit was dismissed because it was considered that all the proper parties had not been joined, the Court held upon the construction of section 2 of Act VIII of 1859: "It is not enough that the former suit has been heard and determined. The cause of action must be heard and determined."[6] In *Futteh Singh* v. *Mussamut Luchmee Koer*,[7] upon the same section Phear, J., observed: "It seems clear that the objection to a suit on the ground of multifariousness or misjoinder of causes of action is an objection to the hearing of the suit; and if it prevails at whatever time, it has the effect of preventing a determination. . . . The fact that the Court has in form passed a decree dismissing the suit does not alter the character of the determination."

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[1] L. R., 1 H. L. (Sc. Ap.), 117 [1867].

[2] *Keshava Tharagan* v. *Rudran Nambudri*, I. L. R., 5 Mad., 259 [1882].

[3] *Shib Nath Chatterjee* v. *Nubokissen Chatterjee*, 21 W. R., 189 [1874].

[4] I. L. R., 8 All., 282 [1886].

[5] 4 Bom. H. C. (A. C.), 110 [1866].

[6] *Pursun Gopal Pal* v. *Poornanund Mullick*, 21 W. R., 272 [1874].

[7] 21 W. R., 105 [1874], referring to *Powell* v. *Cockerell*, 4 Hare, 562 [1845].

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So a case summarily dismissed for a technical defect or irregularity of any kind cannot work an estoppel by judgment.[1] To conclude a plaintiff by a plea of res judicata, it is not sufficient to show that there was a former suit between the parties. It is necessary also to show that there was a decision finally granting or withholding the relief sought.[2]

Final decision.

In *Roghoonath Mundul* v. *Juggut Bundhoo Bose*,[3] certain raiyats in a suit brought against them by their zemindar, alleged that the area and the rent payable in respect thereof had been overstated, but the suit was decided against them on the ground that they had signed jamabandis. It was held that a suit by them for measurement was not barred. Admitting that the measurement of the land had been a matter directly and substantially in issue in the former suit, it could not be said that such matter was heard and finally decided.

Where a suit was dismissed, having regard to section 42 of Act I of 1877, on the ground that the plaintiffs had omitted to sue for possession, but had merely asked for a declaration of their proprietary right and to have a certain gift set aside, the decision was held no bar under section 43 of the Code to a suit for possession and to have the deed declared void.[4]

There can be no question of res judicata where a suit has been dismissed on the ground that the Court had no jurisdiction to try it ;[5] or that it should have been instituted in a Court of inferior jurisdiction,[6] although a decision may have been given upon other issues ; or where it has been dismissed because the permission of Government was not previously obtained ;[7] or as against a party whose name was ordered to be expunged from the record in a

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[1] *Ramnath Roy Chowdhry* v. *Bhagbut Mohapattur*, 3 W. R. (Act X), 140 [1865] ; *Shokhee Bewa* v. *Mehdee Mundul*, 9 W. R., 327 [1868], approved in *Ramireddi* v. *Subbareddi*, I. L. R., 12 Mad., 500 [1889].

[2] *Saikappa Chetti* v. *Rani Kulandapuri Nachiyar*, 3 Mad. H. C., 84 [1866].

[3] I. L. R., 7 Calc., 214 [1881].

[4] *Ram Sewak Singh* v. *Nakched Singh*, I. L. R., 4 All., 261 [1882].

[5] *Baban Mayacha* v. *Nagu Shravucha*, I. L. R., 2 Bom., 19 [1876], a case where the rights of the Crown and of the public in the waters and the subjacent soil of the sea are exhaustively discussed. The cause of action in the two suits was, however, different.

[6] *Ram Gobind Jha* v. *Munger Rao Chowdhry*, 13 C. L. R., 83 [1883]. See *Rajendro Lall Gossami* v. *Shamachurn Lahori*, I. L. R., 5 Calc., 188 [1879], as to undervaluation.

[7] *Pattaravy Mudali* v. *Audimula Mudali*, 5 Mad. H. C., 419 [1870] ; *Puteli Meheti* v. *Tulja*, I. L. R., 3 Bom., 223 [1879].

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former suit;[1] or where a suit to remove an attachment is dismissed on the ground that the attachment has already been removed ;[2] or where a suit has been dismissed for failure to pay the costs of service of summons on the defendants;[3] or on the ground that it was premature ;[4] or wrongly framed.[5]

Certain cases in connection with sections 102, 103, 373, and 381 of the Code have now to be considered.

Ss. 373, 381. Plaintiff failing to give security for costs and to obtain leave of Court.

In *Rungrav Ravji* v. *Sidhi Mahomed*,[6] the defendants had in a previous suit prayed to have a promissory note delivered up and cancelled on the ground of fraud and want of consideration. That suit was dismissed on the then plaintiffs falling to give security for costs under section 381 of the Code. In a suit upon the note, the Court held that the previous suit was no bar to the question of fraud and want of consideration being raised, observing : " I do not think that the Court can properly be said to hear and decide a matter which it is relieved from hearing and deciding by the plaintiff's default."

In the above case the *defendant* was met with an answer of res judicata to his defence. Latham, J., remarked : "I can, however, feel no doubt that under the words of section 13 of Act X of 1877 'suit or issue,' the answer is admissible to estop a defendant from defence as well as a plaintiff from attack, and in England *Outram* v. *Morewood*[7] is directly in point." The learned Judge further observed : " I give no opinion as to the result if a *plaintiff* whose suit had been dismissed under section 381, should again attempt to litigate the subject-matter of the dismissed suit. Possibly the reference to section 373 may be found sufficient to preclude him from so doing."

S. 102 where defendant appears and plaintiff does not appear.

The learned Judge raised a further question which has been discussed in subsequent cases. He remarked: "I think it clear

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[1] *Kalee Coomar Dutt Roy* v. *Pran Kishoree Chowdhrain*, 18 W. R., 29 [1872].

[2] *Kashinath Morsheth* v. *Ramchandra Gopinath*, I. L. R., 7 Bom., 408 [1883].

[3] *Bessessur Bhugut* v. *Murli Sahu*, I. L. R., 9 Calc., 163 [1882].

[4] *Shaikh Elahee Buksh* v. *Baboo Sheo Narain Singh*, 17 W. R., 360 [1872]; *Ramereddi* v. *Subbareddi*, I. L. R., 12 Mad., 500 [1889], where a previous suit by the assignee of a mortgage-bond against the mortgagor had been dismissed on the ground that notice had not been given under section 132 of the Transfer of Property Act (IV of 1882).

[5] *Deodhari Singh* v. *Lala Sewsurun Lall*, 3 C. L. R., 395 [1878].

[6] I. L. R., 6 Bom., 482 [1882].

[7] 3 East, 346 [1803].

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S. 103 decree by default bars fresh suit.

that the Civil Procedure Code does not contemplate the dismissal of a suit by default under section 102 as preventing the plaintiff, by section 13, from again litigating the same matter, as if so, the first sentence of section 103[1] would be superfluous; but, no doubt, this may be explained on the ground that the decision under section 102 is not a final one within Explanation IV to section 13. It is hard to conceive that the Legislature should have intentionally visited a plaintiff with a heavier penalty for failing to give security for costs than for failing to appear."[2]

However, in *Ramchandra* v. *Bhikibai*,[3] a Division Bench of the Bombay Court expressed a contrary opinion in an analogous case in the following terms :—

For the same object and upon the same cause of action.

"We entertain no doubt that it would be contrary to the intention of the Legislature to allow a plaintiff, whose plaint has been rejected for default in the Mamlatdar's Court under Bombay Act III of 1876, to bring another possessory suit on the same cause of action in the Civil Court under section 9 of the Specific Relief Act, 1877. The rule of res judicata is laid down in section 13 of Act X of 1877, and we think that the rejection of a plaint under section 13 of Bombay Act III of 1876 is a hearing and final decision of the suit within the meaning of section 13 of the Code. It is certainly a final decision, and the section of the Bombay Act itself treats the suit as having been heard, for it provides that the plaintiff may take certain steps to have the suit *reheard*.

In *Gobind Chunder Addya* v. *Afzul Rabbani*,[4] Garth, C. J., considered the operation of section 103[5] of the Code to be limited to those cases only where a second suit is brought for the same object and cause of action as the suit which is dismissed, and this appears to be the correct view. In that case Linton sued Harper for rent

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[1] "When a suit is wholly or partially dismissed under section 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action."

[2] I. L. R., 6 Bom., 486.

[3] I. L. R., 6 Bom., 477 [1882].

[4] I. L. R., 9 Calc., 426 [1882].

In *Shankar Baksh* v. *Daya Shankar*, L. R., 15 I. A., p. 71 [1887]. Sir Barnes Peacock refers in the argument to this case as well as to *Nelson* v. *Couch*, 15 C. B. (N. S.), 99 [1863]; and *Phillips* v. *Ward*, 2 H. & Co., 717 [1863], to show that in order to constitute a res judicata it must be shewn that the plaintiff could have recovered in the former suit that which he seeks in the second. See *Midland Ry. Co.* v. *Martin*, L. R., '93, 2 Q. B., 172.

[5] Corresponding with ss. 114 and 119 of Act VIII of 1859. See *Mohabeer Pershad* v. *Lala Ram*, 11 W. R., 193 [1869]; *Mofizooddeen* v. *Shaikh Amoodeen*, 23 W. R., 59 [1874].

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of a piece of land, and the defence was that the land belonged to one Afzul Rabbani who was accordingly made a party. The suit was dismissed for Linton's default. A purchaser from Linton then sued to obtain possession of the land from Afzul. The Court held the matter was not res judicata, the former suit being founded upon a different cause of action, and the question of title having only incidentally arisen therein and not having been heard and finally decided.

The Bombay High Court in *Ramchandra Jivaji Tilve* v. *Khatal Mahomed Gori*,[1] took a similar view of the section. The first suit was for redemption against Ramchandra, the mortgagee, and was dismissed for the plaintiff's default. The plaintiff then sued his vendor, who he alleged had undertaken to pay off the mortgage, and Ramchandra, who had since the first suit purchased the equity of redemption, seeking to recover possession, and praying that the defendants might be compelled specifically to perform their contracts. The Court held that the causes of action in the two suits were different, and that section 103 should receive a somewhat strict construction.

Privy Council decisions.

The conclusiveness of decrees by default under section 114 of the Code of 1859 and section 103 of the present Code, came for consideration before the Judicial Committee in two recent cases, and an authoritative rule has been laid down. In *Shankar Baksh* v. *Daya Shankar*,[2] the mortgagor had, in the year 1864, sued to redeem a mortgage, claiming the under-proprietary right in virtue of a sub-settlement. The suit was dismissed under section 114 of Act VIII of 1859, the plaintiff not appearing in person or by pleader. In a subsequent suit to redeem the mortgage, the plaintiff claimed the superior proprietary right. Their Lordships held that the difference in the mode of relief claimed did not affect the identity of the cause of action which was in both cases the refusal of the right to redeem, and that the judgment in the prior suit was final under section 114. In *Chand Kour* v. *Partab Singh*,[3] the plaintiffs, as nearest agnates of a deceased proprietor, sued for a declaration that a gift made by a widow of the estate of

Causes of action identical

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[1] I. L. R., 10 Bom., 28 [1885].

[2] I. L. R., 15 Calc., 422; L. R., 15 I. A., 156 [1888].

[3] I. L. R., 16 Calc., 98; L. R., 5 I. A. [1887].

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her late husband did not affect their right of succession on her death. Prior to the gift, a suit by two of the plaintiffs, praying for a declaration and to have the widow restrained by injunction from alienating the same estate, had been struck off in 1878 for the plaintiffs, default under sections 102 and 103 of the Code. The plea of res judicata was raised as against these two plaintiffs. Their Lordships held that the plea was inoperative. "The ground of action in the plaint of 1878 is an alleged intention on the part of the widow to affect the estate to which the plaintiffs had a reversionary right by selling it, in whole or in part, or by affecting it with mortgages. The cause of action set forth in the present plaint is not mere matter of intention, and it does not refer to either sale or mortgage. It consists in the allegation that the first defendant has in point of fact made a *de praesenti* gift of their whole interest to a third party. That of itself is a good cause of action if the appellants' right is what they allege. It is a cause of action which did not arise and could not arise until the deed of gift was executed, and its execution followed the conclusion of the proceedings of 1878. It appears to their Lordships that the two grounds of action, even if they had both existed at the time, are different."

Causes of action different.

Upon the provisions of sections 102 and 103 of the Code the Judicial Committee observed: "The dismissal of a suit in terms of section 102 was plainly not intended to operate in favour of the defendant as res judicata. It imposes, however, when read along with section 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour." The plaintiffs therefore succeeded.

Ss. 102, 103 preclude plaintiff from bringing a fresh suit on the same cause of action or ground of right.

In *Watson* v. *The Collector of Rajshahye*,[1] a decree had been passed dismissing the suit on the ground that the plaintiff had failed to prove his case. There was a reservation in the decree allowing

Power to allow plaintiff to withdraw with liberty to bring fresh suit.

[1] 13 M. I. A., 160 (170) [1869]. See *Mona Bibee* v. *Oomed Ali*, 16 W. R., 276 [1871].

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him to bring another suit, but the case had in fact proceeded to final judgment. Section 97 of Act VIII of 1859 allowed the Court, in all cases where sufficient ground was shewn and where final judgment had not been passed, to give permission to the plaintiff to bring a fresh suit. And section 373 of the present Code gives a similar power where the suit must fail by reason of a technical defect or (in the Court's discretion) for other sufficient grounds.

Application of s. 373 read with Watson *v.* Collector of Rajshahye [1869], where there has been a hearing but no adjudication on the merits.

In the case now cited the Judicial Committee observe: "We have not been referred to any case, nor are we aware of any authority, which sanctions the exercise by the country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a non-suit, known in those Courts. There is a proceeding in those Courts called a non-suit which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of the parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp; and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit."

Difference of opinion at Allahabad.

The principles laid down in *Watson* v. *The Collector of Rajshahye*[1] have led to some difference of opinion in the Allahabad High Court. The case of *Muhammad Salim* v. *Nabian Bibi*[2] has been mentioned as having been decided upon a technical point. In that case a previous decision of two other Judges of the Allahabad Court, *Ganesh Rai* v. *Kalka Prasad*,[3] was dissented from on the ground that the suit appeared to have been dismissed in the form in which it was brought, because the plaintiff had omitted to file with his plaint a document on which he relied. The fact, however, was

[1] 13 M. I. A., 160 [1869].
[2] I. L. R., 8 All., 282 [1886].
[3] I. L. R., 5 All., 595 [1883].

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overlooked that in the earlier case there had been a hearing; and the judgment, although given upon the merits, was not appealed from, the report of that case being misleading.

In *Kudrat* v. *Dina*,[1] another Division Bench at Allahabad reaffirmed the principle of the decision in *Ganesh* v. *Kalka Prasad*[2] upon the ground that issues had been framed at the hearing and evidence taken, and the judgment was not appealed from, and they distinguished *Muhammad Salim* v. *Nabian Bibi*[3] as having been dismissed upon a preliminary and technical point without any hearing or decision of the matter in issue. The same learned Judges in *Banwari Das* v. *Muhammad Mashiat*[4] re-asserted the same principle. In the case now cited permission had been given to bring a fresh suit, and the decree was held to be in effect one of non-suit within the prohibition in *Watson* v. *The Collector of Rajshahye*,[5] the decree not being made under section 373 of the Code. The previous decisions were reviewed by a Full Bench in *Sukh Lal* v. *Bhikhi*,[6] and were held to be reconcilable. In that case, a suit for possession of immoveable property was wholly dismissed on the ground that the plaintiff had not made out his title to the whole of the land he claimed, although he had proved his title as to a one-third share. Leave was expressly reserved to him to bring a suit for that share, and in that suit he was met by the plea of res judicata. The Court held that this plea must prevail, the decree not being made under section 373. In this case the discussion turned chiefly upon the point whether the previous cases could be reconciled, and no general principles are in terms enunciated. The rule, as established by the Allahabad cases, is apparently this that, where a suit fails upon a technical point, the plaintiff should be allowed to withdraw under section 373. Unless leave is granted to him under that section, the previous suit will, if there has been a hearing (though no decision upon the merits), work an estoppel by res judicata.

In Allahabad the rule of section 373 was applied to execution proceedings in *Sarju Prasad* v. *Sita Ram*,[7] but this view

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[1] I. L. R., 9 All., 155 [1886].
[2] I. L. R., 5 All., 594.
[3] I. L. R., 8 All., 282.
[4] I. L. R., 9 All., 690 [1887].
[5] 13 M. I. A., 160.
[6] I. L. R., 11 All., 187 [1888].
[7] I. L. R., 10 All., 71.

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has now been overruled by the Judicial Committee in *Thakur Pershad* v. *Sheikh Fakir-ullah*.[1]

In *Ram Charan Buhardar* v. *Reaz-uddin*[2] the plaintiff had in a former suit established the fact, as against some of the defendants, that he had purchased the rights of his judgment-debtors in the entire *taluk*, but on the further and more important point as to what lands he was entitled to by virtue of his purchase, the Courts found themselves unable to come to a decision by reason of errors of form in the frame of the suit. They therefore refrained from deciding that point, and left the plaintiff to bring a fresh suit, framed in such a manner that the Court might be able to grant the relief sought.[3] "It may be," said Garth, C. J., "that in the former suit both Courts ought, properly speaking, to have insisted on proper issues being raised, and to have tried those issues. But we are not prepared to say that the course taken by those Courts was *ultra vires*. They considered, rightly or wrongly, that they were not in a position to try the main question in the cause; and it is clear that a question which was advisedly left undecided in the former suit, cannot be said to have been *heard and finally decided* within the meaning of section 13 of the Code." Calcutta.

Neglect to produce evidence.

It is at any rate clear that, where parties by their own neglect have failed to produce evidence to prove their case after issue has been joined and a decision has gone against them, that decision is final and conclusive.

Marriott v. Hampton [1797].

In the old case of *Marriott* v. *Hampton*,[4] the plaintiff had submitted to judgment in a suit by the defendant for the price of goods sold, not being able to find a receipt which he held from the defendant. He then sued the defendant for money had and received and was non-suited. The Court of King's Bench refused a new trial.

Lord Kenyon, C. J., observed: "If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person.

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[1] L. R., 22 I. A. 44 [1894].

[2] I. L. R., 10 Calc., 857 (860) [1884].

[3] It does not appear from the report whether leave was expressly granted under s. 373. The first suit was dismissed "without prejudice to the plaintiff's right to bring a fresh suit for possession of the lands of the taluk in suit distinctly ascertained."

[4] 17 East., 269 [1797].

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"It would tend," said Grose, J., "to encourage the greatest negligence if we were to open a door to parties to try their causes again because they were not properly prepared with their evidence. Of the general principle there can be no doubt." And Lawrence, J., added: "If the case alluded to be law, it goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overhale the former judgment, which is too preposterous to be stated."

The remarks of the Judicial Committee in *Watson* v. *The Collector of Rajshahye*[1]—"their Lordships are aware of no case in which upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit"—have been acted upon in numerous cases.[2]

Suit dismissed on the ground of limitation.

It would appear that a suit which has been dismissed on the ground of limitation alone cannot work an estoppel by res judicata. In *Brindabun Chunder Sircar* v. *Dhununjoy Nushkur*,[3] the plaintiff sued to recover possession, and for declaration of maurasi mokurari rights with mesne profits, a previous suit on the same cause of action having been dismissed under section 27, Bengal Act VIII of 1869, on the ground that it should have been brought within one year from the dispossession. The merits were not on that occasion gone into. The High Court held that the second suit was not barred by section 2 of the Code of 1859, but dismissed the suit on the same ground of limitation as that on which the previous suit had been dismissed.

Upon appeal the matter ceases to be res judicata.

Where the decision of a lower Court is appealed to a superior tribunal, which for any reason does not think fit to decide the matter, the question is left open and is not res judicata. The fact of an appeal being in point of form dismissed is not conclusive as to every point decided by the lower Court.[4] In *Gungabishen*

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[1] 13 M. I. A., 170 [1869].

[2] *Sahadeo Pandey* v. *Nokhid Pandey*, 15 W. R., 573 [1871]; *Mofizoodden* v. *Shaikh Amooddeen*, 23 W. R., 58 [1875]; *Kartick Chandra Pal* v. *Sridhar Mandal*, I. L. R., 12 Calc., 563 [1886]; *Kedrat* v. *Dinu*, I. L. R., 9 All., 155 [1886].

[3] I. L. R., 5 Calc., 246 [1879]. See also *Price* v. *Khilat Chander Ghose*, 5 B. L. R. (Ap.) 50 [1870] a case under the Bengal Municipal Act [III of 1874].

[4] *Chunder Coomar Mitter* v. *Sib Sundari Dassee*, I. L. R., 8 Calc., 631 [1882].

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Bhugut v. *Roghoonath Ojha*,[1] the lower Courts had in a previous suit decided issues as to title and possession, but on special appeal the question of possession alone was adjudicated upon. It was held that the question of title was still open to the parties, not having been heard and finally decided with the meaning of the res judicata section. The reason for the rule is very clearly stated in *Nilvaru* v. *Nilvaru*.[2] When the judgment of a Court of first instance is appealed against the matter ceases to be res judicata and becomes res sub judice. When, therefore, a suit is dismissed, but not on the merits, by an Appellate Court, it follows that no finding upon the merits should be recorded.[3]

The effect of a former judgment against which an appeal is pending is discussed in a previous chapter.[4] The principle enunciated in *Nilvaru* v. *Nilvaru*[5] appears to apply in such a case, and this view has been taken by a Full Bench at Allahabad in *Balkishan* v. *Kishan Lal*.[6]

Ex-parte decrees in rent-suits.

In the case of *ex-parte* decrees in suits for rent there has been some conflict in the Courts in this country. In *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree*,[7] the question arose as to the effect to be given to an *ex-parte* decree for rent in a former suit. No issues of fact were raised beyond the general issue involved in the claim whether or not a certain sum was due in respect of the rent claimed. The Court held that the *ex-parte* decree was relevent, not as to the rate of the rent, but solely upon the question whether the particular sum decreed by way of rent was due at the time of the passing of the decree.

Calcutta Full Bench decisions [1874].

In *Maharaja Beerchunder Manick* v. *Ramkishen Shaw*,[8] a Full Bench in Calcutta held that an *ex-parte* decree for rent was admissible in evidence against the defendant to prove the rate of rent which he was liable to pay, although the decree had become barred by limitation. The question of its value as evidence was a question for the lower Courts to determine, and it was open to the

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[1] I. L. R., 7 Calc., 381 [1881].

[2] I. L. R., 6 Bom., 110 [1881]. See *Emamooddeen Sowdaghur* v. *Shaikh Futteh Ali*, 3 C. L. R., 447 [1878]; *Rajah Mokoond Narain Deo* v. *Jonardun Dey*, 15 W. R., 208 [1871]. See *supra*, pp. 295, 296.

[3] *Nunda Lal Rai* v. *Benomali Lahiri*, I. L. R., 11 Calc., 545 [1885].

[4] *Supra*, pp. 296, 297.

[5] I. L. R., 6 Bom., 110 [1881].

[6] I. L. R., 11 All., 148 [1888].

[7] 23 W. R., 149 [1875].

[8] 14 B. L. R., 370 [1874].

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defendant to prove fraud. Another Full Bench, in *Birchunder Manickya* v. *Hurrish Chunder Dass*,[1] held that an *ex-parte* decree in a rent-suit is conclusive as to the rate of rent alleged in the proceedings in the suit, the question as to the rate becoming res judicata by virtue of the decree, and that the fact of *no execution having ever been taken out* by the decree-holder upon his *ex-parte* decree does not prevent the decree having against the defendant the conclusive effect attributed to it.

Birchunder Manickya v. Hurrish Chunder Dass [1878].

Referring to the Full Bench decision of 1874 the Court observed: "What the Full Bench judgment, in our view of the matter really meant was this: that an *ex-parte* decree is *primâ facie*, for the purposes of evidence, as good as any other decree, and as binding between the parties upon a matter decided by it. But if the defendant could show, as he said he was prepared to do, that the former decree was obtained by fraud, or that it was irregular or contrary to natural justice, or the like, the *ex-parte* decree although of force between the parties in the suit in which it was given, might be properly considered as of no value for the purposes of evidence in any other suit. A decree obtained *ex-parte* is, in the absence of fraud or irregularity, as binding for all purposes as a decree in a contested suit. If it were not so, a defendant in a rent-suit might always by not appearing, and allowing the judgment to pass against him without resistance, prevent the plaintiff from ever obtaining a definitive judgment as to what is the proper amount of rent due from him to his landlord . . . Of course if any fresh circumstances had arisen since the former decree was made, which would justify on the one hand an abatement, or on the other an enhancement of the rent decreed in the former suit, the Court would be bound to take such circumstances into consideration. But no evidence of this kind was adduced by the defendant in the present case. The only materials which he brought forward, upon which the judgment of the Court below ultimately proceeded, consisted of evidence which the defendant might and could have brought forward, if he had so pleased in the former suit, and which he offered no excuse for not producing on that occasion. We think, therefore, that the principle upon which we decided

[1] I. L. R., 3 Calc., 383 [1878].

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the case of *Nobo Doorga Dossee* v. *Foyz Buksh Chowdhury*,[1] and which has been acted upon by this Court in other cases, applies with equal force here."

In *Nilmoney Singh* v. *Heera Lall Dass*,[2] the alleged execution [1880] of the decree was held to be fraudulent, and no steps were taken to give finality to the decree. A division Bench of the Calcutta Court observed: "A decree is not final within the meaning of Explanation IV, s. 13, of the Code of Civil Procedure, so long as it is open to the Court on the application of the parties to modify it." This decision was followed in *Bhugirath Patoni* v. *Ram Lochun Deb*.[3] The decree never having been executed, and its *execution being barred*, the defendants were allowed to dispute the rate of rent claimed, and the plaintiffs were bound to prove that they had received it.

Modhusudan Shaha Mundu v. Brae [1889].

The question of the conclusiveness of an *ex-parte* decree came before a Full Bench of thirteen Judges of the Calcutta High Court in *Modhusudan Shaha Mundul* v. *Brae*.[4] In that case four questions were referred. *First*, whether an *ex-parte* decree for arrears of rent operates so as to render the question of the rate of rent res judicata between the parties? *Second*, whether it so operates, if the rate of rent alleged by the plaintiff is recited in the decree, without any express declaration that the rate of rent so alleged has been proved? *Third*, whether it so operates, if the rate of rent alleged is expressly declared by the decree to have been proved? *Fourth*, whether an *ex-parte* decree operates so as to render any question decided by the decree res judicata, in the absence of proof that such decree was executed?

Questions referred.

Issue as to rent.

The Full Bench answered the first three of these questions in the negative, *upon the assumption that the question of the rate of rent has never been put in issue* between the parties by reason of an express declaration of the rate having been asked for in the plaint. As to the fourth question, they declined to give an answer on the ground that the matter had not been fully argued.

Execution.

Calcutta Full Bench [1889].

The learned Judges considered the cases of *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree*[5] and *Birchunder Manickya* v. *Hur-*

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[1] I. L. R., 1 Calc., 202; 24 W. R., 403 [1878].

[2] I. L. R., 7 Calc., 23 [1880].

[3] I. L. R., 8 Calc., 275 [1882].

[4] I. L. R., 16 Calc., 300 [1889].

[5] 23 W. R., 149.

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rish Chunder Dass[1] as being in direct conflict upon the question whether an *ex-parte* decree in a rent suit is conclusive as to the rate of rent alleged in the proceedings in the suit, and referred to an unreported case[2] where it is said that in an undefended case every material allegation in the plaint is denied impliedly within the meaning of section 13 of the Code because the plaintiff has to prove every such allegation. The Court then observed[3] :—

"It was argued before us that the statement in the plaint of an alleged rate of rent, in such a case, would not be an allegation so material that, in the absence of proof of it, the plaintiff could not obtain a decree, even although he were to show conclusively that the amount of rent claimed in the suit was actually due, on the footing of a different rate of rent from that mentioned in the plaint being the true rate.

"We think this argument well founded. We think that, if at the hearing of such suit, the plaintiff were to prove that the amount claimed by him as rent was actually due, although he did not establish the rate named by him in his plaint, he might nevertheless be entitled to a decree. That such a case might possibly arise is obvious. If it might, it follows that the statement of the rate of rent in the plaint is not necessarily an allegation so material that the determination of it in the affirmative is involved in the act of the Court in making a decree.

"It follows from this that, in our opinion, the mere statement of an alleged rate of rent in the plaint in a rent-suit, in which an *ex-parte* decree is made, is not a statement as to which it must be held that an issue within the meaning of section 13 of the Code of Civil Procedure was raised between the parties so that the defendant is concluded upon it by such decree.

"We are of opinion also that neither a recital in the decree of the rate alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make the matter a res judicata; assuming, of course, that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case."

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[1] I. L. R., 3 Calc., 383.

[2] *Puncharam Mundul* v. *Krishna Pria Dasi*, Sp. Ap., No. 1271 of 1887.

[3] I. L. R., 16 Calc., 300 (306).

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There must be a trial of right.

The principle of the Full Bench case appears to be this. Where a matter is alleged by the plaintiff in such a manner that, if the case were contested upon the merits, the Court would exercise its judicial mind upon it; then if the defendant, having an opportunity of being heard, refuses to be heard, he must be taken to have impliedly denied the plaintiff's allegations. The plaintiff is then put to proof of his case and obtains a final and conclusive decision of the Court. *Ex parte* decrees generally will be held conclusive as to matters which have been beard and decided on the merits.

Decree for rent passed upon defendant's admission.

Where a plaintiff claims as rent a particular sum and the Court holds that he has failed to establish that to be due, but upon an admission by the defendant gives a decree for a lesser sum, the question arises whether such a decree operates to determine conclusively the due amount payable for the year in respect of which rent is claimed.[1]

What was the issue decided?

The answer to this question depends upon the facts, whether the previous decision was that the plaintiff should recover upon the admission, or that the sum so admitted to be due was the proper amount of rent payable for the period in question. In the former case the question as to the rent payable for the period covered by the first suit will be res judicata. In the second case, the decree conclusively determines the rate of rent until the rate is altered by agreement.[2]

No res judicata unless the Court has found what was the proper rate of rent.

In *Punnoo Singh* v. *Nirghin Singh*,[3] the Court had in the previous suit passed a decree upon the defendant's admission without finding the proper rate of rent. It was held that such a finding did not operate to determine the rate, and that the plaintiff could prove what rent was due in respect of subsequent years. But in *Jeo Lal Singh* v. *Surfun*,[4] the plaintiff failed to prove the amount of rent claimed by him, and the Court tried an issue as to what was the proper amount of rent payable to the plaintiff, and gave a decree for the amount which the defendant admitted. Such a decree was held to operate as res judicata in a suit brought for the rent of a subsequent year.

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[1] See *Hurry Behary Bhagat* v. *Pargun Ahir*, I. L. R., 19 Calc., 656 [1890].

[2] *Ib.*

[3] I. L. R., 7 Calc., 298 [1881].

[4] 11 C. L. R., 483 [1882]. See *Mon Mohinee Debee* v. *Binode Beharee Shaha*, 25 W. R., 10 [1875].

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The question, therefore, in such cases will be whether in the former suit the Court came to a decisive finding as to what the proper amount of rent was, and this may be ascertained from a common sense view of the judgment by seeing what was the issue decided. "Perhaps," observed the Court in *Hurry Behari Bhagat* v. *Pargun Ahir*,[1] "it would not be too much to hazard the opinion that, as a general rule in these cases, the amount found due upon the failure of the plaintiff to prove his alleged jama, upon the admission of the defendants, was probably found due as the proper amount of jama payable."

Where therefore in a rent-suit a Judge tries the question and gives judgment on the question "what is the yearly rent?" and makes that the foundation of his judgment, that decision is res judicata between the parties.—*Bakshi* v. *Nizamuddi*[2] following *Hurry Behari Bhagat* v. *Pargun Ahir*. But where a defendant has failed to prove that a portion of the land was not in his possession such a defence is still open to him in a suit for subsequent arrears, each year's rent being in itself a distinct and separate cause of action.—*Nilmadhub Sarkar* v. *Brojo Nath Sarkar*.[3]

Conclusiveness of partition-proceedings.

Certain cases as to the conclusiveness of partition-proceedings may be here noticed. In *Mussamat Oodia* v. *Bhopal*[4] a decree for partition was held to bar a suit to declare that one of the parties was only entitled to maintenance. In *Ghasee Khan* v. *Kulleo*[5] a case also decided under the Code of 1859, the dismissal of a suit for partition on the ground that the plaintiffs had failed to establish their rights was held a bar to a subsequent suit grounded upon an admission of the defendants in the previous proceedings.

No res judicata unless issue raised and finally decided.

Where, however, the previous suit was dismissed as premature, and no such issue was raised and finally decided, a different rule applies. In *Shivram* v. *Narayan*[6] both the parties in the first suit alleged a previous partition and claimed that the land in question had been allotted to them. The Court held that no partition had taken place and that the field was joint. A suit for partition of

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[1] I. L. R., 19 Calc., 636 (639) [1890].
[2] I. L. R., 20 Calc., 305 [1892].
[3] I. L. R., 21 Calc., 256 [1893].
[4] 3 Agra, 137 [1868]: the facts are imperfectly reported.
[5] 1 Agra, 152 [1866].
[6] I. L. R., 5 Bom., 27 [1880].

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the entire field was held not to be res judicata. In *Lakshman Dada Naik* v. *Ramchandra Dada Naik*,[1] a suit for partition had been dismissed, as to part of the property as being premature during the plaintiff's father's lifetime, and as to part on the ground of jurisdiction. After his father's death the plaintiff again sued his brother for partition. Their Lordships of the Privy Council held that there had been no adjudication in the previous suit as to the rights of the brothers upon their father's death. This ruling was followed in *Konerrav* v. *Gurrav*,[2] where also the effect of Explanation II was considered.

In the case last cited the plaintiff had previously sued upon what purported to be a deed of partition, but the document was held to be invalid, and the suit was dismissed with liberty to the plaintiff to sue again for a general partition. The Court appeared to incline to the view taken by Garth, C.J., in *Denobundhoo Chowdhry's case*,[3] and held that the cause of action as well as the relief sought were different in each case; and that, although the plaintiff might in the former case have prayed alternatively for a partition and might have been allowed to combine both grounds of attack in that suit, yet it could not be said that he *ought* to have done so. Similarly, in *Nilo Ramchandra* v. *Govind Ballal*,[4] the dismissal of a suit on an alleged family agreement was held not to bar a suit based on a hereditary right claiming a share in a *vatan* estate. So, in *Sadu* v. *Baiza*,[5] a decree obtained upon an agreement for a portion of the property, was held no bar to a suit in which the plaintiff claimed the whole of the ancestral property as heir of his father and brother.

Estoppel by conduct or by previous decision.

It is not necessary, however, that the partition to render it conclusive should be by metes and bounds. Provided there has been an agreement or evidence amounting to an assent or expression of will, that will be sufficient to estop the parties if there has been a change of position.[6] And if the question has been directly and substantially in issue in a former suit the decree in such suit will operate as res judicata where the question raised upon that

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[1] I. L. R., 5 Bom., 48; L. R., 7 I. A., 181; 7 C. L. R., 320 [1880].

[2] I. L. R., 5 Bom., 589 [1880].

[3] I. L. R., 2 Calc., 152 [1876].

[4] I. L. R., 10 Bom., 24 [1885].

[5] I. L. R., 4 Bom., 37 [1879].

[6] *Ananta Balacharya* v. *Damodhar Makund*, I. L. R., 13 Bom., 25 (31) [1888], citing West and Bühler (3rd ed.), 681, and see *supra*, p. 78.

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issue has been decided, the status of the family having been declared in the former suit.[1]

Although decision may relate to a different property.

In *Ananta Balacharya* v. *Damodhar Makund*,[2] a memorandum of partition was drawn up between two brothers in 1864 dividing the family property in equal shares, and providing that, if at any time the sons did not agree, they should exercise ownership in accordance with the document. In 1876 the plaintiffs sued the defendant's father to recover their half share of the rent of certain property upon the basis of the partition, and it was held that the partition was proved. In 1883 the plaintiffs sued to recover possession of certain other property, and the defendants sought to attack the partition, but it was held that they could not be permitted to do so, a distinct issue having been raised and decided in the suit of 1876, although that suit related to different property.[3]

Where a partition deed between two brothers, A and B, provided that the property was only to descend to sons and grandsons, and upon the death of A, B sued A's widow, alleging that he had been joint with his brother, and that by the custom of the family women did not inherit, and the Court held that no such custom was proved, and that the deed was an ordinary partition-deed, the matter was afterwards held to be res judicata between the surviving brother and the widow's daughter.[4] A party by his own neglect may be held bound by the conclusiveness of partition-proceedings. In *Sheikh Hossein Buksh* v. *Sheikh Musund Hossein*,[5] the plaintiff by suit established his right to a 9-gundas share in a certain puttee. Before decree pronounced, he made himself a party to certain butwara proceedings before the Collector, but omitted to include his claim in those proceedings, and was therefore unable to ascertain his 9-gundas share for the purpose of executing his decree upon the property. It was held that he could not bring a second suit against the same parties to have his right declared. In *Hari Narayan Brahme* v. *Ganpatrav Daji*,[6] four brothers by suit partitioned certain ancestral property, excluding the village of Saspade. Three of them in their plaint claimed the village as

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[1] *Krishna Bakari Roy* v. *Brojesvari Chowdhrani*, I. L. R., 1 Calc., 144; L. R., 2 I. A., 283 [1875].

[2] I. L. R., 13 Bom., 27 [1888].

[3] *Rajah of Pittapur* v. *Sri Rajah Rao Bucki Sittaya Garu*, L. R., 12 I. A., 16 [1884].

[4] *Venkatadri* v. *Peda Venkayamma*, I. L. R., 10 Mad., 15 [1886].

[5] 18 W. R., 260 [1872].

[6] I. L. R., 7 Bom., 272 [1883].

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not subject to partition, and the fourth contented himself with denying their right. Subsequently the grandson of the fourth brother sued the others for partition of Saspade. It was held that the matter was res judicata by the former suit, the plaintiff's ancestor having neglected to bring the property into hotchpot. The Bombay Court observe upon the conclusiveness of partition proceedings, which is subject, however, to certain exceptions, as where the property lies in different jurisdictions or, being in the possession of a mortgagee, is not available for distribution.

Where, however, A, one of two joint owners, obtained a decree for partition against B, his co-owner, but the commission was never proceeded with, and A subsequently obtained a decree for an account and sale of the property in respect of a mortgage which he held against his co-owner's share, it was held that the second decree extinguished B's right to redeem, and that the property was no longer subject to partition under the previous decree.[1]

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[1] *Kirty Chunder Mitter* v. *Annth Nath Dey*, I. L. R., 10 Calc., 97 [1883].

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CHAPTER VII.

JUDGMENTS IN REM.

Judgments in rem—Prior to the Evidence Act—*Varakalamma* v. *Narasamma* [1864]—*Kashya Lall* v. *Radha Churn* [1867]—Section 41 of the Evidence Act—Purposes for which such judgments are conclusive—Probate—Competent Domestic Courts—Foreign Judgments—Matrimonial—Competent Domestic Courts—Foreign Judgments—Admiralty—Adjudications in matters of Prize—Foreign Judgments—Jurisdiction—Insolvency.

Judgments in rem.

THE subject of judgments in rem remains to be considered. Much of the difficulty which surrounded this subject is removed by the enactment in the Evidence Act[1] to be noticed shortly, at least so far as domestic judgments in rem are concerned. As regards the conclusive effect of such judgments, their scope appears to have been much limited by recent decisions,[2] and it is probably not inaccurate to say that such judgments operate in rem only so far as the judgment itself is concerned.[3] It will be most useful first, to examine the way in which judgments in rem were regarded prior to the Evidence Act; and secondly, to notice the purposes for which they are now to be deemed conclusive.[4]

Judgments in rem prior to the Evidence Act.

Prior to the year 1864, the opinion appears to have prevailed in India that, if any Court declared the status of anybody or anything, the validity of an adoption, the partibility of property, the

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[1] Act I of 1872, s. 41.

[2] *DeMora* v. *Concha*, L. R., 29 Ch. D., 268 [1885]; *Concha* v. *Concha*, L. R., 11 Ap. Ca., 541 [1886.]

[3] See pp. 25, 26, *supra*.

[4] "One thing has been agreed upon with regard to these cases . . that for certain purposes, not well defined, the judgment is binding not merely inter partes, but inter omnes. . . The difficulty heretofore has mainly been to ascertain some principle upon which to rest this class of judgments so as to determine what classes fall within it. It has often been said that judgments in rem bind all persons because all persons are deemed to be parties to them. . . Still another ground has been taken with regard to Prize cases to wit, the propriety of leaving the cognisance of such cases to other Courts having the more appropriate jurisdiction to try them. . . Again, it has often been said that judgments in rem determine status: and this is sometimes put apparently in regard to their broadly conclusive effect. . . It will help, however, to an understanding of this broadly conclusive character of judgments in rem to look to the purposes for which they are thus conclusive." Bigelow on Estoppel, 5th ed., pp. 45—47.

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rule of descent of a particular family, the divisibility of a zemindary or any other question of the same nature, the judgment, being one upon status, was conclusive against all the world.[1] The Madras Court in the year 1864 in the course of certain extra-judicial observations examined the whole question,[2] and came to the conclusion that, in the case of Judgments in Rem, there was a fictitious extension of the rule of res judicata in the case of certain proceedings, and before the rule could be applied in this country, consideration should be given to the question whether there were Courts which would warrant the application of the doctrine of decrees in rem. In 1867 the question was fully considered by a Full Bench of the Calcutta High Court in *Kanhya Lall* v. *Radha Churn*.[3] Peacock, C.J., in delivering the judgment of the Court, concurred in the conclusions arrived at by Mr. Justice Holloway, and proceeded to examine the meaning of the expression "in rem" and the function of *actiones prejudiciales* in the Roman law, the latter being in his opinion the origin of the rule as to judgments on actions in which questions relating to status were determined.[4] These actions were said to resemble actions in rem because they did not make any mention of any particular person and were not brought upon any obligation.[5] *Actiones prejudiciales* dealt with questions of paternity, filiation, and other questions of status.[6] The Chief Justice pointed out that there were, at that time, no suits in India, with the exception of those in the High Court in the exercise of Admiralty and Vice-Admiralty jurisdiction, which answered to the *actiones in rem* of the Civil Law, and none corresponding with the *actiones prejudiciales*, and continued: "We have little to do with foreign judgments. Suits in the Exchequer for the condemnation of goods are not applicable to this country, and it is therefore unnecessary to refer to them.[7] We have not as yet any suits here for divorce *a vinculo*

Yarakalamma v. Naramma [1864].

Kanhya Lall v. Radha Churn [1867].

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[1] *Yarakalamma* v. *Naramma*, 2 Mad. H. C., 276 (279) [1864].

[2] *Ib.*, *per* Holloway and Phillips, JJ. The Note in Smith's Leading Cases, 9th ed., Vol. ii, p. 838, is there criticised very fully. See also the observations of Peacock, C.J., in *Kanhya Lall* v. *Radha Churn*, 7 W. R., 338 [1867]; and of the Judicial Committee in *Jogendro Deb Roykut* v. *Funindro Deb Roykut*, 14 M. I. A., 367 (373) [1871].

[3] 7 W. R., 338.

[4] *Ib.*, 343.

[5] *Ib.*, 343, Just. Inst., Bk. IV, Tit. 6, s. 13.

[6] Sandar's Just., note to *ib.*

[7] See *Yarakalamma* v. *Naramma*, 2 Mad. H. C., 276 (287) [1864].

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matrimonii so far as Christians are concerned, so that no questions can arise as to the effect of judgments in such suits.[1]

Peacock, C.J. "Decrees by Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties... This, in my opinion, is not upon the principle that every one is presumed to have had notice of the suit . . but upon the principle that when a marriage is set aside by a Court of competent jurisdiction it ceases to exist, not only so far as the parties are concerned, but as to all persons . . . . . The record, of a decree in a suit for divorce or of any other decree, is evidence that such a decree was pronounced, and the effect of a decree in a suit for a divorce *a vinculo matrimonii* is to cause the relationship of husband and wife to cease .. but it is not conclusive or even *primâ facie* evidence against strangers that the cause for which the decree was pronounced existed.

"It is unnecessary to consider the principle upon which grants of probate and of letters of administration have been held to be conclusive upon third parties. It would throw no light upon the present question, and the Indian Succession Act,[2] section 242, points out expressly the effect which they have over property and the extent to which they are to be conclusive.

"It is quite clear that there are no judgments in rem in the Mofussil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers either as conclusive, or even as *primâ facie* evidence to prove the truth of any matter directly or indirectly determined by the judgment or by the finding upon any issue raised in the suit whether relating to status, property, or any other matter."[3]

Judgments in rem, s. 41, of the Evidence Act.

Section 41 of the Evidence Act is based upon the above remarks. A judgment, order, or decree in order to operate otherwise than *inter partes* must be a final judgment of a competent Court made in the exercise of Probate, Matrimonial, Admiralty, or Insolvency jurisdiction.[4]

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[1] See now The Indian Divorce Act (IV of 1869).

[2] Act X of 1865. See *Yarakalamma* v. *Naramma*, 2 Mad. H. C. R., 287.

[3] See *Yurakalamma* v. *Naramma*, 2 Mad. H. C. R., 288.

[4] That section as amended by Act XVIII of 1872 provides that—"A final judgment order or decree of a competent Court in the exercise of Probate, Matrimonial, Admiralty, or Insolvency Jurisdiction, which confers upon or takes away from

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Purposes for which conclusive.

It is to be observed that the section is limited in its terms to certain purposes for which the judgments of these Courts are declared to be conclusive, namely, the legal character to which a person may be declared to be entitled, or to which a person may be declared not to be entitled, and the title which a person may be declared to possess in a specific thing. These purposes remain to be considered briefly.

Probate.

Competent Domestic Courts.

And first as to Courts exercising Testamentary and Intestate jurisdiction. The High Courts exercise this jurisdiction under their respective charters, and certain other Civil Courts in British India have jurisdiction in matters of probate and administration under the Indian Succession Act,[1] the Hindu Wills Act,[2] and the Probate and Administration Act.[3]

Conclusive for what purposes.

The decrees of competent Courts of Probate upon the testamentary character of instruments, and upon the title derived from a grant of probate or letters of administration, would appear to be conclusive upon all persons as to the genuineness of the testamentary instrument and the fact that it was executed according to the law of British India, and as to the legal character conferred upon the executor or administrator.[4] The grant, however, does not establish the domicile of the testator,[5] or the fact that the dispositions made by the will were within the testator's power. "The result," says Mr. Bigelow, "appears to be that it is the judgment of the Probate Court on the will, as distinguished from specific findings or facts necessarily involved therein, that is

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any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order, or decree, is conclusive proof—that any legal character which it confers accrued at the time when such judgment, order, or decree came into operation; that any legal character, to which it declares any such person to be entitled accrued to that person at the time when such judgment, order, or decree declares it to have accrued to that person; that any legal character which it takes away from any such person ceased at the time from which such judgment, order, or decree declared that it had ceased or should cease; and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order, or decree declares that it had been or should be his property."

[1] Act X of 1865. See s. 242.

[2] Act XXI of 1870.

[3] Act V of 1881.

[4] *DeMora* v. *Concha*, L. R., 29 Ch. D., 268 [1885]; *Whicker* v. *Hume*, 7 H. L. Ca., 124 [1858]; *Concha* v. *Concha*, L. R., 11 Ap. Ca., 541 [1886].

[5] *Concha* v. *Concha*, L. R., 11 Ap. Ca., 541 [1886].

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binding upon all persons.[1]" In connection with this subject the case of *Concha* v. *Concha* in the House of Lords and the elaborate arguments in the Court of Appeal[2] deserve careful study. The above observations will, it is conceived, apply in the case of Foreign Judgments in matters of Probate.[3]

Foreign Judgments.

Matrimonial.

Secondly, as to the Courts exercising Matrimonial jurisdiction.

Competent Domestic Courts.

The different High Courts exercise this jurisdiction by virtue of their respective charters, and certain other Civil Courts are empowered to exercise such jurisdiction under the Indian Divorce Act[4] and other Acts.[5]

Decrees of Domestic Courts in divorce cases, in distinction to the specific necessary findings therein and grounds thereof,[6] are conclusive *inter omnes*,[7] but may be re-opened on the ground of

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[1] Bigelow on Estoppel, 5th ed., 230, 231. In *Arunmoyi Dasi* v. *Mohendra Nath Wadadar*, I. L. R., 20 Calc., 888 [1893], a suit for construction of a will was held not to be barred by an incidental finding as to the construction by the Court of the North-West Provinces in an application for letters of administration. Such finding being only conclusive as to the representative title of the grantee. See Act V of 1881. Ss. 19, 59; *Behary Lall Sandyal* v. *Juggo Mohun Gosain*, I. L. R., 4 Calc., 1 [1878].

[2] *DeMora* v. *Concha*, L. R., 29 Ch. D., 268 (see especially Mr. Rigby's argument, 281—291, where the authorities are fully cited). See also on this subject a note by Mr. Bigelow in the Law Quarterly Review, Vol. ii, 406, and an article in the Indian Jurist, 1887, p. 284. See *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy*, I. L. R., 6 Bom., 703 [1882], for observations upon judgments in rem. See also the Indian Succession Act (X of 1865), ss. 188 & 191, and the corresponding sections (12 & 14) of Act V of 1881.

[3] "Where a will has been proved and deposited in a Court of competent jurisdiction situated . . . in a foreign country and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed." [Act X of 1865, s. 180, and Act V of 1881, s. 5.] Where, however, a deceased person has left property in British India letters of administration must be granted according to the rules prescribed in the Succession Act, although he may have been a domiciled inhabitant of a country in which the law relating to testate and intestate succession differs from the law of British India.—Act X of 1865, s. 207.

[4] Act IV of 1869: Section 2 provides that Courts can only grant relief under the Act where the petitioner professes the Christian religion and resides in British India at the time of presenting the petition, and can only make decrees of dissolution or nullity of marriage where the marriage has been solemnised in British India, or where the adultery, &c., has taken place in British India.

[5] The Parsee Marriage and Divorce Act (XV of 1865); The Native Converts Marriage Dissolution Act (XXI of 1866). An Act to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Mahomedan, Parsee, Buddhist, Sikh or Jaina religions, and to legalise certain marriages the validity of which is doubtful (Act III of 1872); and the Indian Christian Marriage Act (XV of 1872).

[6] See Bigelow on Estoppel, 5th ed., 227.

[7] So in England the verdict of a jury at the trial of a petition for divorce by a wife against her husband finding that the husband has been guilty of adultery and cruelty, and a decree *nisi* in accordance with such verdict are conclusive evidence of such adultery and cruelty in a subsequent suit between the same parties in

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fraud or collusion.[1] Mr. Bigelow observes that questions relating to the conclusiveness of decrees in cases of marriage and divorce have more frequently arisen in cases of foreign decrees. Such cases, however, are rare in this country. A divorce pronounced by a foreign Court would probably be regarded as binding where the parties were at the time of the suit domiciled within the jurisdiction.[2]

Foreign judgments.

A distinction has, however, been drawn in England between the decree of a foreign Court pronouncing a divorce, and a sentence of a foreign Court pronouncing the nullity of a marriage. In *Sinclair* v. *Sinclair*,[3] Lord Stowell observed that adultery and its proofs were nearly the same in all countries, but that the validity of a marriage must depend upon the local law, and he was not prepared to say that a judgment of a third country, on the validity of a marriage solemnised outside its jurisdiction and between persons not its subjects, would be universally binding. The judgment of a foreign Christian tribunal having competent jurisdiction would, however, since the case of *Harvey* v. *Farnie*, in all probability be considered conclusive upon matters of marriage and divorce.[4]

Admiralty.

The High Courts of Calcutta, Madras and Bombay exercise Admiralty and Vice-Admiralty Jurisdictions as Colonial Courts of Admiralty constituted under the provisions of 53 and 54 Vict., c. 27, which has been extended to India by Act XVI of 1891.[5]

Matters of Prize.

"The one established case," observes Mr. Bigelow, "of the full operation of a judgment in rem is an adjudication of prize or an acquittal thereof in the Admiralty; it has often been determined that condemnations are conclusive upon all persons, not only of

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which the husband *seeks* similar relief against the wife, *Butler* v. *Butler*, L. R., 1894, P. D., 25. But a decree for restitution of conjugal rights is not res judicata where the decree is not executed and there is a second withdrawal from cohabitation. *Kishar Lall* v. *Bai Pareati*, I. L. R., 18 Bom., 32 [1893].

[1] "You ought to show externally," observed Langdale, M. R., in *Perry* v. *Meddowcroft* [10 Beav., 138, 9 (1586)], "and independently of the proceedings in the cause that there was collusion or concert between the parties, but you must not wholly lose sight of the proceedings themselves which are very often of such a nature that you cannot help suspecting some bad faith."

[2] Westlake, Private International Law, § 46.

[3] 1 Hagg, 294 [1798].

[4] See *Roach* v. *Garvan*, 1 Ves. Sr., 157 [1748]; *Shaw* v. *Gould*, 3 E. & I. Ap., 55 [1868]; Westlake, § 321; *Harvey* v. *Farnie*, L. R., 8 Ap. Ca., 43 [1882].

[5] See *In the matter of the Falls of Ettrick*, I. L. R., 22 Calc., 511 (515) [1894].

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the title or change of property, but also of the findings of *necessary* facts upon which the condemnation was pronounced. And this has been held to be true not only for the purposes of the judgment itself, but also for collateral purposes, such as questions turning upon a warranty of neutrality of a ship in a contract of insurance upon her, where the ship has been seized, condemned and sold upon breach of such neutrality. . . . Cases of adjudication in the Court of Admiralty in matters of collision have also been thought to afford an illustration of the operation of judgments in rem."[1]

Collision.

Foreign judgments.

Questions as to the conclusiveness of judgments in matters of prize have generally arisen in relation to the judgments of foreign Courts.[2] Such judgments have been held conclusive not only for their own proper purposes but for other purposes as well, but Mr. Bigelow expresses a doubt whether, since the case of *Concha* v. *Concha*, the findings and ground of the judgment, as distinguished from the judgment itself, would be deemed conclusive upon all the world.[3]

Jurisdiction.

It is a condition precedent to the sentence being treated as conclusive that the foreign Court had jurisdiction. "We think," said Blackburn, J., in *Castrique* v. *Imrie*,[4] "the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the Court sits; and secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."

Insolvency.

Insolvency jurisdiction is exercised by the High Courts of Calcutta, Madras and Bombay under their respective charters, and

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[1] Bigelow on Estoppel, 5th ed., 221, 222.

[2] Bigelow on Estoppel, 5th ed., 222. See *Bernardi* v. *Motteux*, 2 Doug., 574 [1781]; *Hughes* v. *Cornelius*, 2 Sm. L. Ca., 9th ed., 825 [32 Car. II]; *The Helena*, 4 Rob. Adm., 3 [1801], the case of the capture and judicial sale of an English ship at Algiers. See *Godard* v. *Gray*, L. R., 6 Q. B., 139 (148); *Schibsby* v. *Westenholz*, L. R., 6 Q. B., 155—159 [1870].

[3] Bigelow on Estoppel, 5th ed., 242.

[4] 4 E. & I. Ap., 414 (429) [1870]. See *Cammell* v. *Sewell*, 3 H & N., 617; S.C., 5 H. & N., 728. The question of the conclusiveness of the sentences of foreign Courts of Admiralty in matters of Prize is discussed at length in the notes to Smith's Leading Cases, 9th ed., Vol. ii, 882—896.

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by the Mofussil Courts under Charter XX of the Code of Civil Procedure. The judgment of a competent Court in matters of Insolvency would appear to be conclusive only for its own proper purposes and objects as defined by the enactments from which the Court derives jurisdiction.[1]

As already mentioned, the expression "Judgments in Rem" does not occur in the Evidence Act, and in this country the number and scope of such judgments appears to be extremely limited. It is a matter of some doubt how far foreign judgments in rem are to be held as governed by the principles examined in the following chapter.

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[1] See Westlake, Chapter VI, as to the effect in England of Foreign Adjudications in Insolvency.

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CHAPTER VIII.

Foreign Judgments in Personam.

Principles upon which foreign judgments are enforced—The matter rests upon the ground of duty or obligation—Implied contract—In England the merits may not be examined—Definitions—Suits to which foreign judgments may operate as a bar—Suits brought to enforce foreign judgments—Judgments of the Courts of Native States—Conflicting opinions in Bombay and Madras—Amendment of s. 14 of the Code—Leading principles and Indian decisions—(*a*) Judgment must be final and conclusive—*Nouvion* v. *Freeman* [1889]—Pendency of appeal—(*b*) May be impeached as contrary to natural justice—Propositions in *Schibsby* v. *Westenholz* [1870]—Voluntary waiver of objection to jurisdiction—Madras decisions—Where submission not voluntary—*Parry & Co.* v. *Appasami Pillai* [1880]—Limitation Act, s. 14—Contract made by traveller in foreign country—Madras decisions—Where defendant has had no opportunity of making defence and Court has no jurisdiction—Joint Stock Companies—*Copin* v. *Adamson* [1874]—Bombay decisions—Execution of foreign decree—(*c*) May be impeached on the ground of fraud—*Abouloff* v. *Oppeheimer* [1883]—Execution refused on the ground of—(*d*) Rule in England that merits may not be examined—Reason for the English rule—Suggested rule in India.

Principles upon which Foreign judgments are enforced.

The principles upon which Foreign Judgments are enforced rest upon the proposition that rights acquired under the law of one civilised State ought to be recognised in all other civilised States. It is, however (in the case of foreign judgments, *in personam*), the right acquired under the foreign judgment, a right which has, by virtue of the judgment, been ascertained as existing, rather than the foreign judgment itself, which is recognised. In *Schibsby* v. *Westenholz*,[1] Blackburn, J., observes that such judgments are not enforced upon the principle of "that which is loosely called 'comity,'" but that the matter rests upon the ground of duty or obligation.

The matter rests upon the ground of duty or obligation.

"It is not," said the same learned Judge in *Godard* v. *Gray*,[2] "an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless there are reciprocal treaties to that effect. But in England and those States

[1] L. R., 6 Q. B., 155 (159) [1870].

[2] L. R., 6 Q. B., 139 (148) [1870].

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which are governed by the Common Law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any Statute, but upon a principle very well stated by Parke, B., in *Williams* v. *Jones*.[1] 'Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced.'"

Implied contract.

The same principle is stated in another form by Brett, M. R., in *Grant* v. *Easton*,[2] where it was contended that a foreign judgment created a liability of an inferior degree. "An action upon a foreign judgment may be treated as an action in either debt or assumpsit; the liability of the defendant arises upon the *implied contract* to pay the amount of the foreign judgment."

In England the merits may not be examined.

It is now considered established in England that the Courts do not sit to hear appeals from foreign tribunals,[3] the presumption being that a Court of competent jurisdiction has given a right judgment,[4] and it is now settled that where a foreign judgment has conclusively established the existence of a debt, the merits may not be examined, and the judgment can only be attacked on the ground of fraud or want of jurisdiction.[5]

Definitions.

A foreign Court is defined in the Court of Civil Procedure as a Court situate beyond the limits of British India, and

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[1] 13 M. & W., 633 [1845], an action of debt upon the judgment of a County Court. See *Russell* v. *Smyth*, 9 M. & W., 819 [1842], an action for costs awarded by the Court of Session in Scotland in a suit for divorce, the defendant who was resident in England having entered an appearance.

[2] L. R., 13 Q. B. D., 302 [1883]. See *Bhavanishankar Shivaram* v. *Purandri Kalidas*, I. L. R., 6 Bom., 292 [1882]. Foreign judgments *in personam* were at first regarded only as *prima facie* evidence of a debt and liable to be impeached. See *Walker* v. *Witter*, 1 Doug., 1 (5) [1778] *per* Lord Mansfield; *Hall* v. *Odber*, 11 East., 118 (124) [1809], *per* Lord Ellenborough; *Houlditch* v. *Donegall*, 2 Cl. & F., 470 (477) [1834], *per* Lord Brougham; *Smith* v. *Nicholls*, 5 Bing. (N. S.), 208 (221) [1839], *per* Tindal, C. J.

[3] See *Trafford* v. *Blanc*, L. R., 36 Ch. D., 600 (617) [1887].

[4] *Per* Lord Bramwell in *Nouvion* v. *Freeman*, L. R., 15 Ap. Ca., 15 [1889].

[5] In *Sreehuree Bukshee* v. *Gopal Chunder Samunt* [15 W. R., 500], the general rule is stated as follows: "Foreign judgments must, in order to be received, finally determine the points in dispute, and must be adjudications upon the actual merits; and they are open to be impeached upon the ground that the foreign Court had no jurisdiction, whether over the cause, over the subject-matter, or over the parties, or that the defendant never was summoned to answer, or had no opportunity of making his defence, or that the judgment was fraudulently obtained" [1871].

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not having authority in British India, nor established by the Governor-General in Council; and a foreign judgment is the judgment of such a Court.[1] When a foreign judgment is relied upon, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appears on the record, but the presumption may be removed by proving the want of jurisdiction.[2]

Suits to which a foreign judgment may operate as a bar.

There is, however, a distinction between suits brought by a party to enforce a foreign judgment, and suits where the defendant sets up a foreign judgment by way of defence. The rules applicable to the latter class of cases are to be found in section 14 of the Code of Civil Procedure, which permits such a judgment, when pleaded in bar of a suit, to be examined upon the merits and impeached, if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India, or if it appears to be contrary to natural justice, or to have been obtained by fraud, or if it sustains a claim founded on a breach of any law in force in British India.

Suits brought to enforce foreign judgments.

In the former class of cases the rule, as established in England and recognised to a great extent in this country, has been, until the enactment of Act VII of 1888, section 5, that foreign judgments sought to be enforced by suit were not to be impeached upon the merits. This enactment is to be traced to a conflict between the High Courts of Bombay and Madras as to the weight to be attached to the decisions of the Courts of Native States.

Judgments of the Courts of Natives States.

It was held in Bombay that no suit was maintainable founded upon the judgment of a Court situate in a Native State, and that the Courts of British India cannot enforce the decrees of any Native Courts except in the manner provided by section 434 of

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[1] Act XIV of 1882, s. 2.

[2] See Act XIV of 1882, ss. 2, 13, Expl. VI. See also Act I of 1872, ss. 78 (cl. 6), 82, 86; *Ganee Mahomed Sarkar* v. *Tarini Churn Chuckerbati*, I. L. R., 14 Calc., 465 (upon s. 86). See also the Explanation to s. 12 of the Code: "The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action" ss. 229, 229B as to the execution in British India of the decrees of Courts of Native States; s. 391 as to Commissions issued by foreign Courts; ss. 430—434 as to suits by Aliens and by or against Foreign and Native Rulers.

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Act X of 1877,[1] and it was even doubted whether suits on foreign judgments were maintainable at all in the Civil Courts of India.

Conflicting opinions in Bombay

In *Bhavanishankar Shevakram* v. *Pursadri Kalidas*,[2] the Court observed: "If it had been intended that suits should be brought in the Civil Courts on foreign judgments, it might have been expected that such suits would be expressly provided for. It cannot be said that the question of foreign judgments escaped the notice of the Legislature; for by section 14 of Act X of 1877 a foreign judgment is allowed to be pleaded in bar, no doubt on the principle that '*nemo debet bis vexari pro eâdem causâ*.' But the Code contains no provision for making a foreign judgment an engine of attack, as well as a means of defence. It is not necessary, however, for us to express any general opinion upon this question. The reports show that suits on the judgments of the French Courts in India have been entertained by the Calcutta and Madras Courts; and we are not by any means to be understood as saying that those suits were improperly entertained. What we are now concerned with is the judgments of Courts situate in Native States. We cannot find in the reports a single instance in which a suit founded upon the judgment of such a Court has been entertained by a Court in British India.... It may now be taken as established that a Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. It can feel no confidence that it is doing justice between the parties, except in so far as such confidence is based upon its general belief that the tribunals of the foreign State ordinarily conduct judicial inquiries with intelligence and regularity. Are we justified in reposing such confidence in the tribunals of Native States?" and in *Himmat Lal* v. *Shivajirav*,[3] the same view was taken.

[1] Section 229B of Act XIV of 1882: "The Governor-General in Council may, from time to time, by notification in the *Gazette of India* (*a*) declare that the decrees of any Civil or Revenue Court, situate in the territories of any Native Prince or State in alliance with Her Majesty, and not established or continued by the authority of the Governor-General in Council, may be executed in British India as if they had been made by the Courts of British India, and (*b*) cancel any such declaration. So long as such declaration remains in force, the said decrees may be executed accordingly."

[2] I. L. R., 6 Bom., 292 [1882] overruled. See *Gurdyal Singh* v. *Raja of Faridkot*, I. L. R., 22 Calc., 222 [1894].

[3] I. L. R., 8 Bom., 593 [1884].

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and Madras.

The contrary opinion, however, prevailed in the Madras Court.[1] In *Sama* v. *Annamalai*, where the cases are reviewed, the Court observed: "These cases are sufficient to show that the Civil Courts of this Presidency do entertain suits brought upon foreign judgments, whether of the Courts of Native States, or of the French Courts having jurisdiction in the French territories in India. And the law being thus established in this Presidency, it is perhaps too late to consider whether it may sometimes be unsafe to enforce it.... It would be strange if the law allowed a foreign judgment to be pleaded as a bar to a suit, but not as a cause of action.... The learned Judges in the Bombay case draw a distinction between a judgment of a French Court and that of a Native State; but we are not aware of any principle of law upon which such a distinction could be maintained.... No distinction is made in any part of the Code between the judgment of a French Court and that of a Court of a Native State."

Amendment of s. 14 of the Code.

It was, apparently, with a view to reconcile the above conflicting opinions as to the respect to be shown to the Courts of Native States[2] that the Legislature enacted section 5 of Act VII of 1888.[3] It is not to be apprehended, however, that it was intended to depart from the rules established in England as to the conclusiveness of foreign judgments, but rather to give the Court discretion in certain cases to inquire into the merits. "We are clearly of opinion," observed the Madras Court in *Fazal Shau Khan* v. *Gafar Khan*,[4] "that it was not intended by the Legislature, when amending section 14 of the Code, that parties to an action on a

Probable effect of.

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[1] See *Sama* v. *Annamalai*, I. L. R., 7 Mad..164 [1883]; *Kaliyugam Chetti* v. *Chokalinga Pillai*, I. L. R., 7 Mad., 105 [1883]; *Anakattil Narayana Krishnan Karthavu* v. *Kocheri Pilo*, I. L. R., 6 Mad., 191 [1883] (where it was held that a suit upon a foreign judgment is not cognisable by a Court of Small Causes); *Mathappa Chetti* v. *Chellappa Chitti*, I. L. R., 1 Mad., 196 [1876].

[2] "The proposed addition to s. 14 has reference to the conflicting rulings of the High Courts with respect to suits in British India on judgments of foreign Courts, and is designed to remove one of the objections to such suits being maintainable." Report of the Select Committee on the Bill to amend the Code of Civil Procedure and the Limitation Act. (*Gazette of India*, March 17, 1888, p. 28.)

[3] "Where a suit is instituted in British India on the judgment of any foreign Court in Asia or Africa, except a Court of Record established by Letters Patent of Her Majesty or any predecessor of Her Majesty, or a Supreme Consular Court established by an Order of Her Majesty in Council, the Court in which the suit is instituted shall not be precluded from inquiry into the merits of the case in which the judgment was passed." Act XIV of 1882, s. 14, as amended by Act VII of 1888, s. 5.

[4] I. L. R., 15 Mad., 82 [1881].

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foreign judgment should have the right to have the case re-heard. All that the section says is that the Judge is not to be precluded from inquiry into the merits."

Leading principles and Indian decisions.

It is to be noticed that, whereas the rules applicable to foreign judgments which are pleaded in bar of suits are laid down with tolerable definiteness by section 14 of the Code, no provision exists (apart from the amendment introduced by section 5 of Act VII of 1818) with reference to suits brought to enforce foreign judgments. It becomes necessary, therefore, to summarise the principles laid down in the English cases, and to notice the decisions of the Indian Courts.

(*a*) Judgment must be final and conclusive.

The first principle is that a foreign judgment must finally and conclusively (subject to an appeal to a higher Court) settle the existence of the debt so as to make it res judicata between the parties. The judgment must have been pronounced *causâ cognitâ*, and must be final and unalterable in the Court which pronounced it. But a foreign decree is not final when it can be abrogated or varied by the Court which pronounced it.[1]

Nouvion *v.* Freeman [1889].

"The principle," observed Lord Herschell in *Nouvion* v. *Freeman*,[2] "upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction,[3] where, according to its established procedure, the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be that, in giving credit to the Courts of another country, we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present

[1] *Nouvion* v. *Freeman*, L. R., 15 Ap. Ca., 1 [1889], where a decree obtained in an "executive" or summary proceeding in the Spanish Courts, in which only certain limited defences can be set up (the Courts having jurisdiction in a "plenary" action to entertain and dispose of all and every plea the defendant may urge, and to retry those pleas which have already been put forward) was held not to be a conclusive adjudication. See L. R., 35 Ch. D., 704; L. R., 37 Ch. D., 244. See also *Patrick* v. *Shedden*, 2 E. & B., 14 [1853].

[2] L. R., 15 Ap. Ca., 1 (9).

[3] In *Bababhat* v. *Narharbhat*, I. L. R., 13 Bom., 224 [1888], the question of what is a competent foreign Court is considered.

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case, it . . may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the Courts of this country would proceed in enforcing a foreign judgment altogether fails.

Pendency of appeal.

It is to be observed that the pendency of an appeal in a foreign Court is no bar to a suit upon the judgment which is the subject of the appeal. "In order to its receiving effect here," said Lord Watson in the case last cited, "a foreign decree need not be final in the sense that it cannot be made the subject of an appeal to a higher Court; if appealable, the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal."

In *Scott* v. *Pilkington*,[1] the Court expressed an opinion that the pendency of an appeal in a foreign Court might afford ground for the equitable interposition of the Court to prevent a possible abuse of its process, and upon proper terms to stay execution in the action.

(*b*) May be impeached as contrary to natural justice.

Upon principles of natural justice, a foreign judgment may be impeached upon the ground that the Court was without jurisdiction to try the case, or that the defendant had not been summoned.

In *Schibsby* v. *Westenholz*[2] the Court of Queen's Bench laid down certain propositions as to jurisdiction. Their Lordships observed:—

Where defendant is a subject of,

"If the defendants had been, at the time of the judgment, subjects of the country whose judgment is sought to be enforced against them, we think its laws would have bound them.

or resident in, a foreign country.

"Again, if the defendants had been, at the time the suit was commenced, resident in the country, so as to have the benefit of its laws protecting them, or as it is sometimes expressed, owing temporary allegiance to that country, we think its laws would have bound them. . . . .

Where plaintiff selects foreign tribunal.

"Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him."

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[1] 2 B. & S., 11 (41) [1862].

[2] L. R., 6 Q. B., 155 (161) [1870].

See Act XIV of 1882, s. 14 (*c*).

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Their Lordships, referring to the case of *General Steam Navigation Co.* v. *Guillou*[1] also observed: "It will be seen that those very learned Judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment *merely by appearing to defend themselves against it*. . . . We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant where it is so far not voluntary, that he only comes in to try and save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Brissac* v. *Rathbone*[2] is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound."

Effect of defendant appearing and waiving objection.

In *Kandoth Mammi* v. *Neelancherayil*,[3] the defendants were permanently resident in British territory, and the bond upon which they were sued was executed in British territory and upon a British stamp; the person in whose favour they executed the bond was a resident of both British and French territories, though in the bond he was described as residing in the latter only, and the bond stipulated that the defendants should take the money to him and pay him within a fixed time. The defendants contested the suit unsuccessfully in the Mahé Court. In a suit upon the judgment of the French Court, the question of the French Court's jurisdiction was raised. The High Court observed: "The facts are that the defendant appeared in the Court at Mahé, defended the suit, and made no objection to the jurisdiction. Whether in such circumstances the objection can afterwards be taken in an action upon the judgment is a point stated to be still open by Blackburn, J., in *Schibsby* v. *Westenholz*,[4] but the opinion of the learned Judge is plainly that it cannot. We think that justice requires us to hold that a man who has thus taken the chances of a judgment in his favour which would, if obtained, have relieved him from all liability, is equitably estopped from afterwards setting up the objection."

Voluntary waiver of objection to jurisdiction.

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[1] 11 M. & W., 877 [1843].
[2] 6 H. & N., 301 [1861].
[3] 8 Mad. H. C., 14 [1875]. See *Fazul Shau Khan* v. *Gafar Khan*, I. L. R., 15 Mad., 82 [1891].
[4] L. R., 6 Q. B., 155 (162) [1870].

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Where defendant takes the chance of obtaining judgment in his favour.

In *Nallatambi Mudaliar* v. *Ponnusami Pillai*,[1] Ponnusami and his father, British subjects residing and domiciled in British India, executed in favour of the appellant a bond hypothecating immoveable property in British India but not registered. The appellant obtained an ex parte decree upon the bond in the French Court, but his suit upon the foreign judgment was dismissed in the Subordinate Judge's Court, on the ground that Ponnusami had no notice of the foreign suit. Ponnusami then brought a suit in the French Court to have the ex parte decree set aside taking no exception, as he might have done, to the jurisdiction of the first Court, but pleading want of registration and limitation. The French Court held that the bond having, as it appeared to the Court, been executed in French territory, the law of British India as to registration and limitation did not apply. The ex parte decree was therefore affirmed on the merits, and on appeal this decision was upheld. The appellant then sued in the Subordinate Judge's Court to recover the amount decreed by the French Courts. To this suit Ponnusami pleaded limitation, that the French Court had determined the place where the contract was made upon a consideration of probabilities and not upon direct evidence, and that the bond having been made by British subjects, domiciled in British India, relating to property in British India, the French Courts had no jurisdiction. The contention as to jurisdiction was upheld by the Lower Appellate Court.

Nallatambi Mudaliar v. Ponnusami Pillai [1880].

The High Court observed: "The Municipal law of France has force only within its own territory. A judgment passed under that law can be enforced in British Courts only in virtue of principles of international law which have extra-territorial operation;" and referred to the principles upon which foreign judgments are enforced as stated in *Russell* v. *Smyth*,[2] *Williams* v. *Jones*,[3] and *Schibsby* v. *Westenholz*,[4] remarking that these principles have been adopted by the Courts of British India and recognised by the Legislature, and that jurisdiction over the defendant is an indispensable condition.

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[1] I. L. R., 2 Mad., 400 [1880]. See *Kaliyugam* v. *Chokalinga*, I. L. R., 7 Mad., 105 [1883].

[2] 9 M. & W., 810 [1842].

[3] 13 M. & W., 633; (S.C.), 14 L.J. Ex. 145 [1845].

[4] L. R., 6 Q. B., 159 [1870].

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"We can find no principle for holding," proceeded their Lordships, "that the mere possession of property[1] in a foreign country would, by reason of the protection enjoyed, confer on the Courts of that country jurisdiction over a foreigner, neither domiciled nor resident therein, in respect of matters unconnected with the property. But a foreigner, although he may not owe allegiance to a country or be under the jurisdiction of its Courts, may nevertheless equitably estop himself from pleading that the Courts of that country had not jurisdiction over him. In suing as a plaintiff in the Court of the country to which he owes no allegiance, he has voluntarily submitted to its jurisdiction, and he cannot afterwards object to the validity of the judgment of the Court on the ground that it had no jurisdiction over him."

Proceedings presumed to have been regular.

Upon the contention that the French Courts had come to a wrong decision upon the question of fact as to where the contract was made, the Court observed: "It is not in our judgment a sufficient ground for impugning the judgment of a foreign Court which ordinarily proceeds in accordance with the recognised principles of judicial investigation, to show that in the particular instance its procedure may have been irregular. . . . if there was irregularity, we could not hold it a sufficient ground for refusing respect to the judgment."

Limitation.

And as to the question of limitation, their Lordships remarked: "It is no doubt a highly equitable doctrine that a contract should, in all its incidents, be governed by the law of the country where it is made; but, where limitation is merely prohibitive of the remedy and not destructive of the right, the judgment of a foreign Court is not open to objection on the ground that a suit on the contract would be barred by the law of limitation applicable in the country where the contract was made. It is unnecessary for us to consider whether the judgment of a foreign tribunal would be enforced if it was based on a right which had become extinct under a law of limitation in the country in which the contract was made, and the party sought to be charged therewith had remained subject to that law."

Where submission not voluntary.

The rule, however, is otherwise where the submission to jurisdiction is not voluntary. Where a party defends a suit in a foreign

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[1] See, however, *Becquet* v. *MacCarthy*, 2 B. & Ad., 951 [1831].

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Court merely to escape the inconvenience of being made liable to arrest an attachment of property in foreign territory, protesting at the same time against the assumption of jurisdiction by the foreign tribunal, the foreign judgment does not constitute a valid cause of action in the Courts of British India.

Parry & Co. *v.* Appasami Pillai [1880].

In *Parry & Co.* v. *Appasami Pillai*,[1] the plaintiffs sued in the Pondicherry Court to recover the price of certain indigo alleged to have been sold by them to the defendants at Cuddalore, and obtained a decree. The defendants, who were merchants residing and carrying on business at Madras, and who were not alleged to have ever resided in French territory, or to have enjoyed in any manner the protection of the law of France, appeared and denied the jurisdiction of the French Court. This plea being disallowed, they contended upon the merits that they had not bought the indigo from the plaintiffs. Judgment being given against them the defendants appealed, but did not again raise the question of jurisdiction. The appeal having been dismissed, the plaintiffs sued in the High Court basing their claim upon the foreign judgment and upon the alleged sale and delivery of the indigo. The defendants pleaded jurisdiction and limitation. Muttusami Ayyar, J., referring to *Lloyd* v. *Guibert*,[2] held that there was no special *forum* at Pondicherry, that the defendants had not selected the tribunal,[3] or voluntarily submitted to the jurisdiction as was done in *Kandoth Mammi's case*,[4] but upon the merits found for the plaintiffs holding that they were entitled under section 14 of the Limitation Act to deduct the time spent in litigation in the French Courts.

This decision was reversed upon the last ground. Upan the question of submission to the jurisdiction, the Court referred to *Nallatambi Mudaliar* v. *Ponnusami Pillai*[5] and *Kandoth Mammi* v. *Neelancherayil*,[6] observing, "the tribunal was not the Court of the appellants' choice; by their protest they warned the respondents that they would not allow that the proceedings were everywhere effectual. To escape the inconveniences which would attend a judgment against them if at any time they or their property might be found in French territory, they defended the suit and

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[1] I. L. R., 3 Mad., 407 [1880].

[2] 6 B. & S. [1864]. See the remarks of Willes, J., at p. 133.

[3] See *G. S. N. Co.* v. *Guillou*, 11 M. & W. at p. 894, *per* Parke, B. [1843].

[4] 8 Mad. H. C. R., 14 [1875].

[5] I. L. R., 2 Mad., 400 [1879].

[6] 8 Mad. H. C. R., 14 [1875].

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sought a reversal of the decision. It would have been idle to repeat an objection which they were aware the French Courts would not entertain, but there is nothing to show they abandoned their right to insist on it, should the necessity for doing so arise elsewhere."

Limitation Act, s. 14.

Upon the question of limitation, the Court held that the French Courts were not from defect of jurisdiction or otherwise unable to entertain the claim, but had passed decrees which were effectual in French territory; the provisions of section 14 of the Limitation Act did not therefore apply, and the claim on the contract was barred by limitation, observing at the same time: "We desire to be understood as expressing no opinion whether, under any circumstances, those provisions allow the deduction of the period occupied by litigation in foreign Courts."

Contract made by traveller in foreign country.

The question whether a traveller passing through a foreign country and incurring a debt, thereby becomes subject to the jurisdiction of the Courts of that country and therefore is under an obligation to obey their judgment, has been answered in the negative in this country.

In *Schibsby* v. *Westenholz*,[1] Blackburn, J., observed: "If at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think that the laws of that country bound them; though before finally deciding this we should like to hear the question argued." These observations, however, were considered to refer to a defendant domiciled and resident in a foreign country who had left it after making a contract,[2] and have since been explained in *Gurdyal Singh* v. *Raja of Faridkot*.[3]

[1] L. R., 6 Q. B., 155.

[2] In *Rousillon* v. *Rousillon*, L. R., 24 Ch. D., 351 (357) [1880]. Fry, J., observed upon this passage: "Does not Mr. Justice Blackburn refer there to a casual unexpected leaving of the foreign country by a person who was permanently resident there at the time when the contract was entered into? The place where the contract is to be performed is a very material circumstance."

[3] I. L. R., 22 Calc., 222 [1894]. "Territorial jurisdiction", said Lord Selborne, "attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of *status* or succession governed by domicile, it may exist as to persons domiciled, or who, when living were domiciled within the territory. As between different provinces under one sovereignty the legislation of the sovereign

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Madras decisions.

In *Mathappa Chetty* v. *Chellappa Chetti*,[1] it was held that the mere making of a contract within the jurisdiction of a foreign Court does not give the Court jurisdiction over a defendant neither domiciled or resident or possessing property in the foreign State; and in *Bangarusami* v. *Balasubramanian*[2] the opinion is expressed that no obligation would be incurred under the above circumstances, *Rousillon* v. *Rousillon*[3] being relied upon in support of this view. Referring to that case Shephard, J., observed: "Although not an authority for the main contention, this judgment would tend to support the proposition that the French Court might have had jurisdiction if it had been proved that it was intended that payment should be made at Karikal, and the decision in *Mathappa Chetti* v. *Chellappa Chetti*[4] is in nowise inconsistent with that proposition." No definite opinion was, however, expressed upon the latter point as it was found that the defendants had had no notice of the suit.

Foreign judgment contrary to natural justice, where defendant not subject to jurisdiction and has had no opportunity of making a defence.

Where a defendant has no opportunity of making a defence, and does not reside within the jurisdiction of the foreign country, and the cause of action has arisen out of that jurisdiction, the judgment imposes no duty on the defendant to pay the sum decreed.

In *Hinde & Co.* v. *Ponnath Bryan*,[5] the plaintiffs sued on a bond executed by the defendant in favour of one Bavachi and assigned by him to the plaintiffs, and the defendant set up a decree in the Mahé Court showing a debt due by Bavachi to him. It appeared, however, that the cause of action in the suit in the Mahé

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may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any Foreign Court ought to recognise against foreigners who owe no allegiance or obedience to the power which so legislates.

"In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court to the jurisdiction of which the defendant has not in any way submitted himself, is by International law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the *forum* by which it was pronounced.

"These are doctrines laid down by all the leading authorities .... and no exception is made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it by the Courts of the country in which the cause of action arose or (in cases of contract) by the Courts of the *locus solutionis*. In these cases as well as all others when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice."

[1] I. L. R., 1 Mad., 196 [1876].
[2] I. L. R., 13 Mad., 496 [1890].
[3] L. R., 14 Ch. D., 351.
[4] I. L. R., 1 Mad., 196 [1876].
[5] I. L. R., 4 Mad., 359 [1880].
See Act XIV of 1882, s. 14.

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Court did not arise at Mahé, and that the defendant, Bavachi, did not reside or carry on business there. The Madras Court held upon review that the foreign judgment could not be allowed to operate so as to bar the suit upon the bond, as there was no circumstance in the case which could give the French Court jurisdiction or impose upon the defendant a duty to obey the judgment. In that case, however, the defendant appeared to have been served regularly and the judgment proceeded solely upon the ground of want of jurisdiction in the Mahé Court.

In *Sreehuree Bukshee* v. *Gopal Chunder Samunt*,[1] the parties were not subject to the jurisdiction of the Chandernagore Court, the subject-matter of the suit and the cause of action being in Calcutta, and in addition there was no proof that summons had been served on the defendants, or that they had a fair opportunity of making their defence.

Joint Stock Companies.

In respect of the transactions of a Joint Stock Company formed for the purpose of carrying on business in a foreign country, the opinion has been expressed that the Courts of that country may, under certain circumstances, have jurisdiction over a member of the Company, though he is not a subject of, or domiciled in, or temporarily resident in the country, at the time of the suit.[2] Such members of a Joint Stock Company are, in this view, bound by the law of the country where the business is carried on, in respect of all the transactions of the Company, though they have received no notice of the proceedings.[3] The better opinion, however, appears to be that a defendant is entitled to notice.

The two views are illustrated in the case of *Copin* v. *Adamson*.[4] There Kelly, C. B., observed: "The defendant, as a shareholder in a foreign Company, becomes entitled to all benefits resulting from the possession of the shares; surely it is very reasonable that . . . he should elect a domicile, and that if he does not, one may be elected for him at which process, if necessary, may be served." But the majority of the Court dissented from this view, observing that they could not find a case which has gone so far as to hold

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[1] 15 W. R., 500 [1871], where the rules as to foreign judgments are stated.

[2] *Nullatambi Mudaliar* v. *Ponnusami Pillai*, I. L. R., 2 Mad., 400 (403) [1879].

[3] *The Bank of Australasia* v. *Harding*, 9 C. B., 661 [1850]. See *Copin* v. *Adamson*, *per* Kelly, C. B., L. R., 9 Ex., 345 [1874] *Vallée* v. *Dumergue*, 4 Ex., 290 [1849].

[4] L. R., 9 Ex., 345 [1874].

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a defendant liable under such circumstances, upon a foreign judgment obtained, as this was, without any knowledge on his part of the proceedings. "Suppose," said Amphlett, and Pigott, B. "there had been a provision by the law of France that whenever a member neglected to elect a domicile, he should pay double calls, are we to enforce his liability in an action on a judgment for such calls obtained against him without his knowledge in the foreign Court?"

Bombay decisions.

This view was taken in a recent Bombay case, *Edulji Burjorji* v. *Manekji Sorabji Patel*,[1] where it was held that a defendant was not liable for a call made in his absence when it was not shewn that he had had any notice of the previous proceedings in the winding up.

Where, however, notice has been given to a contributory that a call order has been made in England by the Court, such a call order will be treated in this country as a foreign judgment and enforced as such.[2]

Foreign decree to be executed according to the Code of Civil Procedure.

In *Kandasami Pillai* v. *Moidin Saib*,[3] the plaintiff sued the defendant's father on a bond in the Pondicherry Court and obtained a judgment. Upon the death of the father, the plaintiff sued the defendant upon that judgment in the French Court as the representative of his father. The defendant appeared and pleaded that the bond was not genuine, and judgment was given against him. The plaintiff sued upon that judgment in the Indian Courts, and obtained a decree against the defendant personally for the full amount decreed in the French Court and interest. The defendant appealed on the ground that, as he had not executed the bond, there should be only a decree against him as the representative of his father to be levied from the assets of the deceased. The High Court held the French judgment was to be executed according to the Code of Civil Procedure, which, in the absence of proof of assets received by a representative of the deceased only, gives a decree against the representative to the extent of such assets, but that the defendant having contested the plaintiff's right throughout was personally liable to pay the costs awarded against him in the lower Courts and in the French Court.

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[1] I. L. R., 11 Bom., 241 [1886].

[2] *The London, Bombay, &c., Bank* v. *Hormasji*, 8 Bom. H.C. (O.C.), 200 [1871]. See also *The London, Bombay, &c., Bank* v. *Burjorji*, I. L. R., 5 Bom., 223 [1881]; *The London, Bombay, &c., Bank* v. *Govind Ramchandra*, I. L. R., 9 Bom., 346 [1885].

[3] I. L. R., 2 Mad., 337 [1880].

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(c) May be impeached on the ground of fraud.

It is clearly settled that a foreign judgment can be impeached on the ground of fraud,[1] even although the ground alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign Court,[2] and although the question whether the fraud had been perpetrated was investigated in the foreign Court, and it was there found that the fraud had not been committed.[3] In this case the judgment is impeachable from without, and although it is not permitted to show that the Court was mistaken it may be shewn that it was misled.[4]

Fraud must be proved.

It must, however, appear clearly that fraud existed, the mere averment of fraud being insufficient.[5] The fraud must be a fraud in the procuring of the judgment such as collusion or the like, or fraud in the Court itself,[6] but when this is established, the foreign judgment is avoided and becomes a nullity.

Abouloff *v.* Oppenheimer [1888].

In *Abouloff* v. *Oppenheimer*,[7] Lord Coleridge, C. J., bases the doctrine upon the broad rule that a man may not take advantage of his own wrong, and cites the observations of De Grey, C.J., in the *Duchess of Kingston's case:* "I believe," said the Chief Justice, "that the principle has never been either better or more tersely and neatly stated than it was in the foregoing passages ; and, as it appears to me, the question for the Courts of this country to consider is whether, when a foreign judgment is sought to be enforced by an action in this country, the foreign Court has been misled intentionally by the fraud of the person seeking to enforce it, whether a fraud has been committed upon the foreign Court with the intention to procure its

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[1] See *Ochsenbein* v. *Papelier*, L. R., 8 Ch. Ap., 695 [1873], and the remarks of Lord Selborne upon the previous cases.

[2] *Vadala* v. *Lawes*, L. R., 25 Q. B. D., 310 [1890].

[3] *Abouloff* v. *Oppenheimer*, L. R., 10 Q. B. D., 295 [1883].

[4] *Duchess of Kingston's case*, 2 Sm. L. Ca., 9th ed., 822. In *Ochsenbein* v. *Papelier*, Lord Selborne observed: "The dicta of Chief Justice De Grey have always been considered perfectly sound law and they apply with at least as much force to foreign as to English tribunals."

[5] In *Wallingford* v. *Mutual Society*, L. R., 5 Ap. Cas., 685 (701) [1880], Lord Hatherley observed: "I take it to be settled . . . that the mere averment of fraud in general terms is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error and establish it by evidence. Nobody can be expected to meet a case, and still less to dispose of a case summarily upon mere allegations of fraud without a definite character being given to those charges by stating the grounds upon which they rest." See *Flower* v. *Lloyd*, L. R., 10 Ch. D., 327 [1879].

[6] *Per* Martin, B., in *Cammell* v. *Sewell*, 3 H. & N., 617 (646) [1858].

[7] L. R., 10 Q. B. D., 295 (301).

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judgment. From the time of the *Duchess of Kingston's case*[1] until the present time it has been held that fraud of that kind can be pleaded in the Courts of this country to an action on a judgment, and that if it can be proved it vitiates the judgment and discharges the defendant from the obligation which would otherwise be created."

Execution refused on the ground of fraud.

In *Haji Musa Haji Ahmed* v. *Purmanand Nursey*[2] it was found that the plaintiff had obtained a decree in the Cochin Court by misrepresentation and concealment of material facts. The Bombay Court refused to execute the decree in accordance with the provisions of section 229B of the Code, holding that the section did not remove the decree of the Native State from the category of foreign judgments, and that the effect of the decree could be removed by showing want of jurisdiction in the Native Court.

(*d*) Rule in England that merits may not be examined.

It is now settled in England that, with the above exceptions, neither party can go into the merits of the case in the foreign Court, and it must be taken that they have been conclusively decided. This rule, however, is abrogated with reference to the judgments of certain foreign Courts in Asia and Africa by the enactment in section 5, Act VII of 1888.

Reason for the English rule [1844].

In *Henderson* v. *Henderson*,[3] Lord Denman, C. J., observed that it was not to be presumed that the defendant had had injustice done him, but "the contrary principle holds unless we see in the clearest possible light that the foreign law, or at least some part of the proceedings of the foreign Court, are repugnant to natural justice; and this has often been made the subject of inquiry in our Courts. But it steers clear of an inquiry into the merits of the case upon the facts found: for whatever constituted a defence in that Court ought to have been pleaded there."

[1851.]

In *The Bank of Australasia* v. *Nias*,[4] Lord Campbell, C. J., remarked: "It does not appear, however, that the question has ever been solemnly decided whether in an action on a foreign judgment, the merits of the case upon which the foreign Court has regularly adjudicated between the parties may again be put in issue and re-tried; doubtless it is open to the defendant to show that the foreign Court had not jurisdiction of the subject-matter of the suit, or that he never was summoned to answer and had no

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[1] 1776.
[2] I. L. R., 15 Bom., 216 [1890].
[3] 6 Q. B., 288 (298) [1844].
[4] 16 Q. B., 717 (735) [1851].

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opportunity of making his defence. Perhaps it was in contemplation of these modes in which a foreign judgment may be impeached that it has sometimes been said to be only *primâ facie* evidence." His Lordship then referred to the authorities and proceeded: "Having attentively examined them, we have come to the conclusion that these pleas are bad. . . It may be enough to say that the dicta against re-trying a cause are quite as strong as those in favour of this proceeding; and being left without any express decision, now that the question must be expressly decided, we must look to principle and expediency."

In *Scott* v. *Pilkington*,[1] Lord Cockburn, C. J., said: "It is not denied that, since the decision in *The Bank of Australasia* v. *Nias*[2] we were bound to hold that a judgment of a foreign Court, having jurisdiction over the subject-matter, could not be questioned on the ground that the foreign Court had mistaken their own law, or had come on the evidence to an erroneous conclusion as to the facts." And the question was regarded as settled in *Ochsenbein* v. *Papelier*,[3] [1873.] where Lord Selborne cites the following observations of Mr. Justice Story[4]:—

"It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the Court had no jurisdiction, or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular, and bad by local law, *fori rei judicatae*. To such an extent the doctrine is intelligible and practicable. Beyond this the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the defendant upon proving these merits."

In *Godard* v. *Gray*,[5] Blackburn, J., observed: "If the judg- [1870.] ment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter-evidence negativing the existence of that original cause of action. If, on the other hand, there is a *primâ facie* obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open

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[1] 2 B. & S., 11 (41) [1862]. *De Cosse Brissac* v. *Rathbone*, 6 H. & N., 301 1861].
[2] 16 Q. B., 717 [1851].
[3] L. R., 8 Ch. Ap., 695 [1873].
[4] Conflict of Laws, § 607.
[5] L. R., 6 Q. B., 139 [1870].

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to the unsuccessful party to try the cause over again in a Court, not sitting as a Court of Appeal from that which gave the judgment ;" and remarked that, since the decisions in *Bank of Australasia* v. *Nias*[1] *Bank of Australasia* v. *Harding*,[2] and *De Cosse Brissac* v. *Rathbone*,[3] it was no longer open to contend that a foreign judgment can be impeached on the ground that it was erroneous on the merits ; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law.

Godard v. *Gray*[4] extended the above doctrine, the majority of the Court[5] holding that a foreign judgment could not be impeached by reason of the foreign tribunal adopting a construction, erroneous according to English law, on an English contract, and that it made no difference that the mistake appeared on the face of the proceedings. "It may be," observed Blackburn, J., "that where a foreign Court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation ; but we prefer to imitate the caution of the present Lord Chancellor in *Castrique* v. *Imrie*,[6] and to leave those questions to be decided when they arise, only observing that in the present case as in that, "the whole of the facts appear to have been inquired into by the French Court, judicially, honestly, and with an intention to arrive at the right conclusion."

Suggested rule in India.

It is conceived that the enactment of section 5 of Act VII of 1888 does not materially depart from the above principles except by vesting in the Court a judicial discretion to inquire into the merits of any case in which it appears that no confidence is to be reposed in the foreign tribunal. Where, however, the facts appear to have been adjudicated upon honestly by a properly constituted judicial authority, there is no reason why the decision should not be recognised in the Courts of British India.[7]

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[1] 16 Q. B., 717 [1851].

[2] 9 C. B., 661 [1850].

[3] 6 H. & N., 301 [1861).

[4] L. R., 6 Q. B., 139.

[5] Blackburn and Mellor, JJ. ; Hannen, J., based his concurrence upon the voluntary submission of the defendants to the jurisdiction of the French tribunal observing : "But I do not think that a defendant, not guilty of any laches against whom a foreign judgment *in personam* has been given, is precluded from impeaching it on the ground that it appears on the face of the proceedings to be based on an incorrect view of the English law, even though there may be no evidence that the foreign Court, knowingly or perversely, refused to recognise that law," p. 154.

[6] L. R., 4 E. & I. A., 414(445) [1870.]

[7] See *Fazal Shau Khan* v. *Gafur Khan*, I. L. R., 15 Mad., 82 [1890).

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